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Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity

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ARTICLE

INCAPACITATION THROUGH MAIMING: CHEMICAL CASTRATION, THE EIGHTH AMENDMENT, AND THE DENIAL OF HUMAN DIGNITY

JOHN F. STINNEFORD*

There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes.¹

To be 'cured' against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles and domestic animals.²

INTRODUCTION	599
I. SEX OFFENDERS AND CHEMICAL CASTRATION	569
A. What Do We Know about Sex Offenders?	569
B. What Do We Know about Sex Offender Recidivism?	570
C. What Do We Know about Chemical Castration?	572
II. CHEMICAL CASTRATION LAWS	577
A. The Politics of Castration	577
B. Key Features of Chemical Castration Laws	578
1. California-Style Statutes	578
2. The Oregon Approach	580

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1. *Skinner v. Okla.*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring).

2. C.S. Lewis, *The Humanitarian Theory of Punishment*, in *God in the Dock: Essays on Theology and Ethics* 287, 292 (Walter Hooper ed., William B. Eerdmans's Publ. Co. 1970).

3. The Wisconsin Approach 581

4. The Texas Approach (Voluntary Surgical
Castration) 581

C. Implementation and Continuing Politics 582

1. Implementation Issues—Florida and Oregon 582

2. Continuing Politics of Castration 585

III. CHEMICAL CASTRATION AND THE EIGHTH AMENDMENT 585

A. Cruelty and Human Dignity 586

B. Is Chemical Castration Cruel and Unusual
Punishment? 592

1. Chemical v. Surgical Castration 593

2. Further Characteristics of Chemical Castration 597

CONCLUSION 599

INTRODUCTION

In 1642, during his imprisonment for presenting a royalist petition to the rebellious House of Commons, the cavalier poet Richard Lovelace wrote the following, now-famous lines:

Stone walls do not a prison make,
Nor iron bars a cage;
Minds innocent and quiet take
That for an hermitage;
If I have freedom in my love
And in my soul am free,
Angels alone, that soar above,
Enjoy such liberty.³

These words have achieved lasting fame because they embody the concept of individual dignity and freedom in the face of state coercion. Even when locked in a room, with no possessions, no privacy, and no freedom to come and go as one pleases, Lovelace claims, the prisoner retains a more fundamental kind of liberty: freedom of “mind,” of “soul,” and of “love.” That is, the prisoner remains a person, endowed with reason and free will, the capacity to think, to desire and to make choices—even though the scope of the prisoner’s choices is necessarily constrained by his external circumstances. Because the prisoner still possesses the fundamental capacity for thought and free choice that likens mankind to the “Angels . . . that soar above,” he retains the dignity and personhood essential to human happiness.⁴

3. Richard Lovelace, *To Althea: From Prison*, in *The Oxford Book of English Verse: 1250–1900* 374 (Arthur Quiller-Couch, ed., Oxford U. Press 1919).

4. It is tempting to dismiss Lovelace’s claims about the human dignity of the prisoner as the romantic musings of a poet whose imprisonment was neither very harsh nor very long. Precisely the same claims were made, however, by Holocaust survivor Viktor Frankl in his description of life in a Nazi concentration camp:

But what if this situation were reversed? What if the state could imprison the offender's mind rather than his body? What if it could use medical technology to destroy the offender's capacity to think certain undesirable thoughts, or to undertake certain undesirable actions? Such a prisoner would be free, in the sense that he would no longer be surrounded by "stone walls" or "iron bars"; but in a deeper sense, he would be enslaved, for the state would have transformed the "hermitage" of his mind into a prison. This is, of course, the stuff of science fiction. Numerous works—including, for example, 1984,⁵ *Brave New World*⁶ and *A Clockwork Orange*⁷—imagine a dystopian future in which the state seeks to control the minds of its citizens in order to ensure social order.

Unfortunately, this is also the stuff of present-day reality. This year marks the tenth anniversary of California's enactment of the nation's first chemical castration law.⁸ This law requires certain sex offenders to receive, as part of their punishment, long-term pharmacological treatment involving massive doses of a synthetic female hormone called medroxyprogesterone acetate (MPA).⁹ MPA treatment is described as "chemical castration" because it mimics the effect of surgical castration by eliminating almost all testosterone from the offender's system.¹⁰ The intended effect of MPA treatment is to alter brain and body function by reducing the brain's exposure to testosterone, thus depriving offenders of most (or all) capacity to experience sexual desire and to engage in sexual activity.¹¹ The procedure also carries severe side effects, including drastic reduction in sperm count, irreversible loss of bone mass, diabetes mellitus, pulmonary embolism, and depression, to name a few.¹²

When California's chemical castration statute was enacted, it was widely predicted that the law would quickly be struck down as an obvious example of cruel and unusual punishment.¹³ But this law has not been

We who lived in concentration camps can remember the men who walked through the huts comforting others, giving away their last piece of bread. They may have been few in number, but they offer sufficient proof that everything can be taken from a man but one thing: the last of the human freedoms—to choose one's attitude in any given set of circumstances, to choose one's own way.

Viktor E. Frankl, *Man's Search for Meaning: An Introduction to Logotherapy* 75 (Isle Lasch trans., 3d ed., Simon & Schuster, Inc. 1984).

5. George Orwell, 1984 (Harcourt, Brace & Co., Inc. 1949).

6. Aldous Huxley, *Brave New World* (Perennial Classics 1998).

7. Anthony Burgess, *A Clockwork Orange* (W.W. Norton & Co., Inc. 1987).

8. Cal. Penal Code Ann. § 645 (West 2002).

9. *Id.* See also discussion *infra* sec. II.B.1.

10. See *infra* sec. I.C.

11. See *id.*

12. See *id.*

13. For examples of the debate surrounding California's chemical castration law in the aftermath of its enactment, see e.g. Kathryn L. Smith, *Making Pedophiles Take Their Medicine: California's Chemical Castration Law*, 17 Buff. Pub. Int. L.J. 123 (1998–1999); John S. Murray, *California's Chemical Castration Law: A Model For Massachusetts?* 24 New Eng. J. on Crim. & Civ. Confinement 731 (1998); Philip J. Henderson, *Section 645 of the California Penal Code:*

struck down. Rather, over the past ten years, six additional states have enacted chemical castration laws.¹⁴ There is little evidence that these laws have even been seriously challenged, much less overturned.¹⁵ Moreover, we

California's "Chemical Castration" Law—A Panacea or Cruel and Unusual Punishment? 32 U.S.F. L. Rev. 653 (1998); Lisa MacGillivray, *California's Mandatory Chemical Castration Program for Repeat Sex Offenders: An Analysis of the Legislation Under German and American Constitutional Law*, 21 Suffolk Transnatl. L. Rev. 143 (1997); Kay-Frances Brody, *A Constitutional Analysis of California's Chemical Castration Statute*, 7 Temp. Pol. & Civ. Rights L. Rev. 141 (1997); Avital Stadler, *California Injects New Life into an Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution*, 46 Emory L.J. 1285 (1997); Raymond A. Lombardo, *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sexual Offenders*, 65 Fordham L. Rev. 2611 (1997); Peter J. Gimino, III, *Mandatory Chemical Castration for Perpetrators of Sex Offenses Against Children: Following California's Lead*, 25 Pepp. L. Rev. 67 (1997); Mark J. Neach, *California is on the "Cutting Edge": Hormonal Therapy (a.k.a. "Chemical Castration") is Mandated for Two-Time Child Molesters*, 14 Thomas M. Cooley L. Rev. 351 (1997); Kris W. Druhm, *A Welcome Return to Draconia: California Penal Law § 645, The Castration of Sex Offenders and the Constitution*, 61 Alb. L. Rev. 285 (1997).

14. See *infra* sec. II.B. The additional states are Florida, Iowa, Louisiana, Montana, Oregon, and Wisconsin. Georgia also enacted a chemical castration law, but repealed it this year for unspecified policy reasons. Finally, Texas permits sex offenders to petition for surgical castration under highly circumscribed conditions.

15. The case law regarding chemical castration is exceedingly sparse. See *Jackson v. St.*, 907 So.2d 696 (Fla. 4th Dist. App. 2005) (chemical castration order reversed because trial court failed to meet statutory requirement that review by medical expert occur within 60 days of sentence); *People v. Steele*, 2004 WL 2897955 at *2 (Cal. App. 3d Dist. 2004) (finding that defendant had waived constitutional challenge to chemical castration by failing to raise issue in the trial court, but noting evidence of an "emerging" societal consensus in favor of chemical castration that might shield the procedure from Eighth Amendment challenge); *Houston v. St.*, 852 So.2d 425, 428 (Fla. 5th Dist. App. 2003) (chemical castration order reversed because court failed to meet statutory requirement that it appoint medical expert and specify duration of treatment); *People v. Foster*, 101 Cal. App. 4th 247, 249 (2002) (defendant who signed plea agreement waived right to challenge constitutionality of chemical castration sentence); *Bruno v. St.*, 837 So.2d 521, 522 (Fla. 1st Dist. App. 2003) (plea agreement whereby defendant agreed to reduced sentence in exchange for undergoing surgical castration was illegal because no Florida statute authorized the imposition of surgical or chemical castration for the crime of lewd and lascivious conduct). As noted above, however, there has been considerable scholarly debate regarding the wisdom, morality and/or constitutionality of the chemical castration laws. See sources cited *supra* n. 13. See also Caroline M. Wong, *Chemical Castration: Oregon's Innovative Approach to Sex Offender Rehabilitation, or Unconstitutional Punishment?* 80 Or. L. Rev. 267 (2001); Lisa Keesling, Student Author, *Practicing Medicine without a License: Legislative Attempts to Mandate Chemical Castration for Repeat Sex Offenders*, 32 John Marshall L. Rev. 381 (1999); Larry Helm Spalding, *Florida's 1997 Chemical Castration Law: A Return to the Dark Ages*, 25 Fla. St. U. L. Rev. 117 (1998); Linda Beckman, Student Author, *Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment*, 100 W. Va. L. Rev. 853 (1998); Bryan Keene, *Chemical Castration: An Analysis of Florida's New "Cutting-Edge" Policy Towards Sex Criminals*, 49 Fla. L. Rev. 803 (1997); Jennifer M. Bund, *Did You Say Chemical Castration?*, 59 U. Pitt. L. Rev. 157 (1997); Jodi Berlin, *Chemical Castration of Sex Offenders: "A Shot in the Arm" Towards Rehabilitation*, 19 Whittier L. Rev. 169 (1997); G.L. Stelzer, Student Author, *Chemical Castration and the Right to Generate Ideas: Does the First Amendment Protect the Fantasies of Convicted Pedophiles?*, 81 Minn. L. Rev. 1675 (1997); Kimberly Peters, *Chemical Castration: An Alternative to Incarceration*, 31 Duq. L. Rev. 307 (1993); Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 Am. J. Crim. L. 1 (1990); William Green, *Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. Dayton L. Rev. 1 (1986). There has also been debate regarding the morality, wisdom, and constitutionality of using surgical castration to render sex offenders less

are currently facing a new wave of legislative efforts to impose chemical or surgical castration as a condition for sex offenders' releases from prison.¹⁶

Why is this? No doubt, a variety of factors have contributed to the surprising longevity of the chemical castration laws. Since most criminal cases are resolved by plea bargain, relatively few prisoners sentenced to chemical castration have a right to appeal.¹⁷ Moreover, in at least some states, the chemical castration laws have been inconsistently enforced, further reducing the pool of prisoners who have standing to challenge the laws.¹⁸ Finally, where challenges have occurred, the courts appear to have been able to resolve them on non-constitutional grounds.¹⁹

Part of the problem, however, may lie in the Eighth Amendment itself—or at least in the way it has been interpreted by the Supreme Court. Although the Court has spent considerable energy determining the circumstances under which a state may constitutionally administer the death penalty, it has only rarely had to consider whether a sentence that falls short of death constitutes inherently cruel punishment.²⁰ Indeed, the Court has not declared a non-capital sentence to be inherently cruel since it decided *Trop v. Dulles*²¹ almost fifty years ago.

Moreover, the principles the Supreme Court has adopted for determining whether a punishment is inherently cruel stand in great tension with each other. The Court has identified the following questions as key to determining whether a punishment is inherently cruel: (1) whether it violates the “dignity of man,” which is the “basic concept underlying the Eighth Amendment”;²² (2) whether it violates “evolving standards of decency”;²³

dangerous. See J. Michael Bailey & Aaron S. Greenberg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 Nw. U. L. Rev. 1225 (1998); Stacy Russell, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 Hous. J. Intl. L. 425 (1997); Kari A. Vanderzyl, *Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders*, 15 N. Ill. U. L. Rev. 107 (1994).

16. See *infra* sec. II.C.

17. As of 2002, 95% of state court felony convictions were obtained by guilty plea. See U.S. Dept. of Just., Bureau of Just. Statistics, *Sourcebook of Criminal Justice Statistics*, <http://www.albany.edu/sourcebook/pdf/t5462002.pdf>, tbl. 5.46.2002 (Dec. 2004) (looking at felony convictions in state courts by offense and method of conviction). See also *Foster*, 101 Cal. App. 4th at 249 (defendant waived right to challenge constitutionality by signing plea agreement in which he acknowledged that chemical castration was a possible sentence, and agreed to waive right to appeal conviction and sentence generally).

18. See discussion *infra* sec. II.C.1.

19. See cases cited *infra* sec. II.C.

20. A punishment can be “cruel and unusual,” even if it is not inherently cruel, if it is either grossly disproportionate to the offense, see *Coker v. Ga.*, 433 U.S. 584, 592 (1977) (“[A] sentence of death is grossly disproportionate and excessive punishment for the crime of rape.”), or is an impermissible punishment based on status rather than the commission of a criminal act. See *Robinson v. Cal.*, 370 U.S. 660 (1962). Neither of these types of cruel and unusual punishment is directly relevant to the present discussion.

21. *Trop v. Dulles*, 356 U.S. 86 (1958).

22. *Id.* at 100 (plurality) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”). See also *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“By pro-

(3) whether it involves the “unnecessary and wanton infliction of pain”²⁴—that is, pain that completely fails to further either retributive, deterrent, incapacitative or rehabilitative goals,²⁵ and (4) whether it involves “torture” or “barbarous” methods of punishment, such as drawing and quartering, burning at the stake, or castration.²⁶

The Supreme Court has given very little guidance as to how these principles are supposed to relate to each other, and therefore, it is not entirely clear how a court would rule if it had to decide an Eighth Amendment challenge to the chemical castration laws.²⁷ Are “human dignity” and contemporary “standards of decency” independent values, or does human dignity simply mean “whatever is acceptable by contemporary standards”?²⁸

tecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”); *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003) (“[I]t remains true that the ‘restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.’”) (internal citations omitted); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002); *Atkins v. Va.*, 536 U.S. 304, 311 (2002); *Hudson v. McMillian*, 503 U.S. 1, 11 (1992); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Gregg v. Ga.*, 428 U.S. 153, 173 (1976); *Furman v. Ga.*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). Cf. *Woodson v. N.C.*, 428 U.S. 280, 304 (1976) (plurality) (“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”).

23. *Trop*, 356 U.S. at 101. See also e.g. *Roper*, 543 U.S. at 561.

24. *Gregg*, 428 U.S. at 173.

25. See *Hope*, 536 U.S. at 737 (“unnecessary and wanton inflictions of pain” means pain inflicted “totally without penological justification.”); *Ewing v. Cal.*, 538 U.S. 11, 25 (2003) (States are free to choose their own penological justification, including “incapacitation, deterrence, retribution, or rehabilitation.”) (citing *Harmelin v. Mich.*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

26. See e.g. *Gregg*, 428 U.S. at 169 (citing Anthony Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839, 852–53 (1969)); *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (citing drawing and quartering and burning at the stake as examples of impermissibly cruel punishment); *Weems v. U.S.*, 217 U.S. 349, 377 (1910) (citing castration as an example of inherently cruel punishment).

27. The relative lack of coherence in the Supreme Court’s Eighth Amendment jurisprudence has led to a remarkable level of instability and unpredictability in its case law. For example, in 1980, the Court upheld a recidivist statute that caused a life sentence to be imposed on a small-time offender convicted of his third offense, *Rummel v. Estelle*, 445 U.S. 263 (1980), then struck down, in 1983, a life sentence for a similar offender under a similar recidivist statute, *Solem v. Helm*, 463 U.S. 277 (1983), then upheld, in 2003, a sentence of 25 years to life for a similar offender under California’s “three strikes” law, *Ewing*, 538 U.S. at 11. Similarly, the Court held, in 1989, that it did not violate the Eighth Amendment to execute a mentally retarded person convicted of murder, *Penry v. Lynaugh*, 492 U.S. 302 (1989), or a minor over the age of 15, *Stanford v. Ky.*, 492 U.S. 361 (1989). Both of these decisions were overruled less than 16 years later. See *Atkins*, 536 U.S. at 304 and *Roper*, 543 U.S. at 551.

28. The relationship between “human dignity” and “evolving standards of decency” appears to have changed significantly since these principles were first announced. In *Trop v. Dulles*, the Supreme Court announced both that the “dignity of man” is the essential foundation of the Eighth Amendment, and that the Eighth Amendment should be interpreted in accordance with “evolving standards of decency”—but it did not directly tie these two ideas together. See *Trop*, 356 U.S. at 100–01. The Supreme Court initially treated these two concepts as separate criteria for determin-

Similarly, are “barbarous” punishments (such as torture) always unacceptable, or do they only become unacceptable if they completely fail to further any penological goal? The answer to these questions will largely determine whether the chemical castration laws ultimately stand or fall. As the discussion in Part III, below, will demonstrate, chemical castration is a form of punishment that clearly denies the basic human dignity of sex offenders. Given the great public hatred of sex offenders, however, it is less clear that this punishment violates contemporary “standards of decency.”²⁹ Similarly, as will be shown below, chemical castration is highly similar to the quintessentially “barbarous” punishment, physical castration. But like other “barbarous” forms of punishment, it may also be effective in furthering penological goals, such as deterrence and incapacitation.³⁰

This article will argue that the most effective and appropriate way to determine the relationship between these interpretive principles is to refer them back to the text of the Eighth Amendment, and particularly to the word “cruel.” The word “cruel” is generally taken to mean “indifference to or pleasure in another’s distress.”³¹ As this definition indicates, a “cruel” punishment is not necessarily the same thing as a punishment that “fails to

ing the constitutionality of a given punishment. For example, in *Gregg*, 428 U.S. at 173, the plurality held: “Public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’” More recently, however, the Supreme Court has tended to write as though the requirements of human dignity are synonymous with contemporary public “standards of decency.” See e.g. *Atkins*, 536 U.S. at 311–12. Justice O’Connor has, perhaps unconsciously, provided the most succinct illustration of the contemporary Court’s conflation of these two concepts, by referring to our country’s “evolving understanding of human dignity.” *Roper*, 543 U.S. at 605 (O’Connor, J., dissenting). The potential practical consequences of the Court’s movement from the *Trop/Gregg* approach to the contemporary approach are enormous. The *Trop/Gregg* approach implies that, at a minimum, human dignity provides an Eighth Amendment baseline to protect offenders if public opinion should take a turn toward the harsh and the cruel. Under the contemporary approach, by contrast, the term “human dignity” has no apparent independent meaning. It is whatever public opinion says it is. Such an approach provides little protection when current notions of human dignity become debased, and the public becomes more willing to subject offenders to dehumanizing punishments, such as chemical or surgical castration.

29. In *Steele*, 2004 WL 2897955 at *2 (Cal. App. 3d Dist. 2004), the appellate court stated that it might uphold California’s chemical castration law against an Eighth Amendment challenge on the ground that a “societal consensus” had emerged in favor of this mode of punishment. Ultimately, however, the Court declined to reach the constitutional issue because the defendant had waived it.

30. See discussion *infra* sec. I.C. There is fairly strong evidence that surgical castration will reduce recidivism rates, but it is much less clear that this principle holds true for chemical castration. Specifically, as discussed below, chemical castration imposes severe side effects on sex offenders, which lead, in turn, to high drop-out rates. Once an offender stops receiving MPA treatment, the sex drive appears to return, and the offender becomes dangerous once again. Although the wisdom of utilizing chemical castration to protect public safety is beyond the scope of this article, it seems at least arguable that chemical castration laws may harm public safety by lulling the public into a false sense of security with respect to sex offenders who have been released on the condition that they be chemically castrated. For a bizarre and tragic example of the public safety problem this creates, see *infra* n. 104.

31. *Oxford English Dictionary* (2d ed., Oxford U. Press 1989).

further a penological purpose”; nor is it necessarily the same thing as a punishment that is not acceptable under current “standards of decency.” Rather, the word “cruel” implies a certain relationship between the punisher and the person punished: an attitude that the suffering of the person punished is either unimportant, or is something to be positively enjoyed. In other words, a cruel punishment is one that treats the offender as though he or she were not a human person with a claim to our concern as fellow persons, but as a mere animal or thing lacking in basic human dignity.

This definition of the word “cruel” clarifies that human dignity must be the primary focus of our analysis of the “cruel and unusual punishments” clause. Nonconformity with current standards of decency, or failure to further a penological purpose, may serve as evidence that a given punishment is unacceptably cruel. Similarly, a punishment’s likeness to a “barbarous” form of punishment may help us determine whether it violates the Eighth Amendment. But the key question is whether the punishment treats the offender in a manner that accords with the dignity of the human person.

This question, in turn, requires us to focus on the fundamental difference between persons and things.³² Persons differ from things in at least two ways. First, as the quote from Richard Lovelace indicates, a person generally possesses a measure of reason and free will—an interior realm of freedom that is beyond the reach of the state.³³ Second, a person has a claim to our concern as fellow persons, and has a right to be treated as an end in herself.³⁴ A thing has no claim to our concern, and may be used exclusively for the purposes of others.³⁵

If the Eighth Amendment stands for the proposition that offenders must be treated as persons rather than things, this implies that punishment must satisfy at least two requirements to be constitutional: First, it must not be designed to control or negate the interior capacities of the defendant considered most integral to human dignity, such as reason and free will.³⁶

32. The moral distinction between persons and things has been most famously described by Immanuel Kant: “Beings whose existence depends not on our will but on nature’s, have nevertheless, if they are irrational beings, only a relative value as means, and are therefore called *things*; rational beings, on the contrary, are called *persons*, because their very nature points them out as ends in themselves.” Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, in *Basic Writings of Kant* 143, 185–86 (Allen W. Wood ed., Modern Library 2001).

33. Lovelace, *supra* n. 3.

34. Kant, *supra* n. 32.

35. *Id.*

36. As will be discussed more fully below, chemical castration differs from traditional modes of punishment, such as incarceration, in that it involves a direct imposition by the state on an offender’s capacity to make choices that are not to the state’s liking. To be sure, one of the key traditional purposes of incarceration is to influence offender behavior, either through rehabilitation or specific deterrence. Nonetheless, as the quote from Viktor Frankl, *supra* n. 4, indicates, even the harshest forms of incarceration still leave the offender a basic capacity to make choices. Chemical castration, by contrast, involves direct biological intervention on the inner workings of the brain. Thus, it does not involve a coercive attempt to persuade the offender to conform to the law, but rather takes away his very capacity to choose otherwise.

Second, it must not impose conditions that treat the offender's suffering as either a matter of indifference, or something to be enjoyed. Harsh punishment may comport with human dignity, so long as the harshness does not exceed the offender's actual desert. But punishment that assaults the very personhood of the offender, or treats the offender's suffering as an unimportant (or even desirable) thing in and of itself, violates the Eighth Amendment because it denies the inherent dignity and personhood of the offender.³⁷ Chemical castration fails to meet both of these requirements.

First, the very purpose of chemical castration is to exert control over the mind of the offender by drastically reducing the brain's exposure to testosterone, a hormone which is considered crucial to the "regulation of sexuality, aggression, cognition, emotion and personality" in men and is "the major activator element of sexual desire, fantasies and behavior."³⁸ The procedure is sometimes justified on the ground that some sex offenders are pedophiles who experience deviant (and often unwanted) sexual desire for children, and that for this group of offenders, chemical castration is a beneficial form of medical treatment. This argument fails, however, because the vast majority of sex offenders covered by the chemical castration laws do not have any sexual disorder, much less pedophilia.³⁹ Many of these offenders may be incorrigibly bad, dangerous or antisocial people, but they do not suffer from a sexual sickness.⁴⁰ Thus, subjecting them to chemical

37. See discussion *infra* sec. III.A. Although the current article does not concern capital punishment, it is impossible to discuss the "human dignity" standard without at least briefly considering its applicability to the death penalty. Justice Brennan, both in his concurrence in *Furman v. Ga.*, and in numerous subsequent dissents, strongly voiced the opinion that the death penalty is so violative of human dignity as to violate the Eighth Amendment. *Furman*, 408 U.S. at 286. The Supreme Court rejected this view, however, in *Gregg*, 428 U.S. at 153. Although my purpose here is not to defend capital punishment, this practice can be distinguished from chemical castration in at least two ways. First, unlike chemical castration, capital punishment does not treat the suffering of the offender as a matter of indifference. The Supreme Court has always held that it is impermissible for the state to draw out the length or the painfulness of an offender's execution. See e.g. *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution [sic]."); cf. *Hill v. McDonough*, 126 S. Ct. 2096, 2112–13 (2006) (permitting death row inmate to bring § 1983 suit challenging state's lethal injection procedure as an unduly painful method of execution). By contrast, as discussed in sec. I.C, *infra*, chemical castration imposes severe side effects, including depletion of bone mineral density, that may have the effect of imposing a lingering, torturous death on the offender. Second, although capital punishment ends the life of the offender, it does not permit the state to exert control over the inner workings of the offender's brain and body during her lifetime. The very purpose of chemical castration is to permit the state to exert such control. In other words, the offender subjected to capital punishment continues to be "herself" up until the moment her life ends; in a real sense, the offender subjected to chemical castration does not.

38. Ariel Rösler & Eliezer Witztum, *Pharmacotherapy of Paraphilias in the Next Millennium*, 18 Behavioral Sci. L. 43, 45 (2000). The "mind control" aspect of chemical castration has also led some to question whether it violates a First Amendment right to "mentation." See e.g. Stelzer, *supra* n. 15, at 1707.

39. See discussion *infra* sec. I.A.

40. See *id.*

castration is not even arguably medically appropriate. Rather, it merely replaces the “stone walls” and “iron bars” of a traditional prison (where many sex offenders doubtless belong) with a less expensive but more degrading prison for the mind.⁴¹

Second, chemical castration constitutes a profound physical assault on sex offenders. By pumping massive doses of female hormones into a male body, this procedure subjects offenders to severe physical effects, some of which appear quite likely to have painful, disabling, and possibly fatal long-term consequences.⁴² To take the most troubling example, long term MPA treatment depletes bone mineral density, so that offenders appear likely to experience osteoporosis and multiple bone fractures as a result of their treatment.⁴³ Thus, over the long-term, chemical castration will cease to be merely disabling, and may become something more like torture. The choice of this extraordinarily harmful mode of punishment implies that the health and well-being of sex offenders are simply not important.

Because chemical castration is designed both to shackle the mind and cripple the body of sex offenders, it is doubly cruel, and should be struck down as a violation of the Eighth Amendment.

In Part I of this article, I will examine what we know—and do not know—about sex offenders, recidivism, and chemical castration. Part II will describe the political climate and purposes that gave rise to the chemical castration laws, analyze their key provisions, and set forth the issues that have surrounded attempts to implement these laws over the past ten years. Finally, in Part III, I will argue that chemical castration is an inherently cruel punishment that denies human dignity because it interferes with brain function in a manner that turns the brain itself into a kind of prison, and because it subjects sex offenders to severe physical and mental harm.

41. Of course, the state has previously tried the coercive use of medical technology to control despised groups, and not very long ago. Over the course of several decades during the twentieth century, tens of thousands of criminals and persons with mental illnesses or deficiencies were “rehabilitated” by means of involuntary sterilization. See e.g. Philip R. Reilly, *The Surgical Solution: A History of Involuntary Sterilization in the United States* 94 (John Hopkins U. Press 1991) (citing statistics indicating that between 1907 and 1963, more than sixty thousand people were sterilized under involuntary sterilization laws); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding law permitting involuntary sterilization of feeble-minded individuals housed in state facilities, in order to prevent the propagation of feeble-minded offspring); *Skinner*, 316 U.S. at 535 (striking down law providing for involuntary sterilization of habitual criminals, to prevent them from propagating criminal offspring). Like the chemical castration laws, the states’ use of lobotomies and sterilizations reflected a desire to control those whom society despises, rather than treat them (and punish them, where appropriate) with justice and dignity. We now condemn practices such as involuntary sterilization or lobotomization, because they did not truly rehabilitate their recipients, but maimed them, robbing them of personal capacities such as the ability to procreate or to think and perceive without unwanted impediments. For further information on the Eugenics movement and the sterilization laws, see e.g. Daniel J. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (Alfred A. Knopf 1985); Edward J. Larson, *Sex, Race and Science: Eugenics in the Deep South* (Johns Hopkins U. Press 1995).

42. See *infra* sec. I.C.

43. See *id.*

I. SEX OFFENDERS AND CHEMICAL CASTRATION

A. *What Do We Know about Sex Offenders?*

The popular perception of the sex offender is that of the predatory pedophile—a man who is driven by an uncontrollable lust for children, and who may victimize dozens (or even hundreds) of children if not incapacitated.⁴⁴ Such offenders do exist, and are exceedingly dangerous.⁴⁵ But that group comprises only a small (though highly publicized) percentage of the whole.

Sex offenders generally are a highly heterogeneous group. Researchers have not been able to create a consistent “offender profile,”⁴⁶ nor identify a root cause that explains all (or even most) sex offenses.⁴⁷ Indeed, one group of researchers has recently observed that “our current understanding is no more than the trivial recitation that offenders are created by both nature and nurture.”⁴⁸

Researchers are, however, increasingly coming to a consensus that the personal characteristics of sex offenders, as a group, are similar to those of criminal offenders generally.⁴⁹ Like other criminal offenders, many sex offenders have an “antisocial orientation”—that is, they are impulsive, lack self-control, are oriented toward short-term rewards (despite long-term negative consequences), have pro-offense attitudes, associate with other criminals, and lack empathy for victims.⁵⁰ Additionally, many sex offenders have alcohol or drug abuse problems.⁵¹ Indeed, the recognized psychiatric disorder most common among sex offenders is “antisocial personality disorder,” a condition characterized by “a pervasive pattern of disregard for, and

44. *See infra* sec. II.A.

45. *See e.g.* Barry M. Maletzky & Gary Field, *The Biological Treatment of Dangerous Sexual Offenders, A Review and Preliminary Report of the Oregon Pilot Depo-Provera Program*, 8 *Aggression & Violent Behavior* 391, 392 (2003) (noting that a subgroup of sexual offenders “can be characterized by a predatory pattern; the creation of multiple victims; the commission of more aggressive crimes; often, the presence of attraction to boys; and frequently, the existence of central nervous system (CNS) dysfunction or psychiatric disabilities resulting in deficient impulse control”).

46. Leam A. Craig, Kevin D. Browne, Ian Stringer & Anthony Beech, *Sexual Recidivism: A Review of Static, Dynamic and Actuarial Predictors*, 11 *J. Sexual Aggression* 65, 79 (2005) (“[D]ue to the heterogeneous nature of this group of offenders, there is no current consistent profile of the sex offender.”).

47. Raymond M. Wood, Linda S. Grossman & Christopher G. Fichtner, *Psychological Assessment, Treatment, and Outcome with Sex Offenders*, 18 *Behavioral Sci. L.* 23, 26 (2000) (“[W]e do not have comprehensive etiological theories regarding sexual offenses or sexual offenders.”).

48. *Id.* at 37.

49. *See id.* (Research is beginning to indicate that “the more operative term in sex offender is ‘offender,’ and that theories developed to explain general criminal behavior will increase our understanding of sexually criminal behavior.”).

50. *See e.g.* Leonore M. J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 *Behavioral Sci. L.* 275, 294 (2000).

51. *See id.*

violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.”⁵² The possession of antisocial characteristics is strongly predictive, not just of sex offenses, but of criminal conduct generally.⁵³

Sex offenders who are convicted of victimizing children appear to be similarly heterogeneous.⁵⁴ For example, in a recent study of 142 convicted child molesters in Arizona, only 8.5% were diagnosed with pedophilia.⁵⁵ The most common personality disorder among this group was antisocial personality disorder (12%).⁵⁶ Nearly a quarter of the child molesters were diagnosed as alcoholics (23.2%), and about 10% had drug abuse problems.⁵⁷

B. What Do We Know about Sex Offender Recidivism?

It is difficult to measure recidivism with any precision, as offenders are unlikely to self-report, and many offenses go undetected. Nonetheless, the data we have indicates that, as a class, sex offenders are relatively unlikely to commit future sexual offenses, and actually pose a greater risk of committing future non-sexual offenses. For example, according to two recent meta-studies involving nearly 60,000 sex offenders, the sexual recidi-

52. Am. Psychiatric Assn., *Diagnostic and Statistical Manual of Mental Disorders* 701 (4th ed., Am. Psychiatric Assn. 2000). See also Simon, *supra* n. 50, at 294 (“Instead of possessing a mental disorder, the results suggest that many child molesters may be antisocial. Consistent with the antisocial character of general offenders, convicted child molesters are likely to possess substance abuse problems and varied nonsex criminal records.”).

53. See e.g. Simon, *supra* n. 50, at 277–78 (“[T]he majority of criminal offenders, including offenders who commit sex crimes, meet at least some of the criteria for antisocial personality disorder, a chronic disorder that rarely begins in adulthood and for which there exists no effective treatment.”); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. Consulting & Clinical Psychol. 1154, 1158 (2005) (“The major predictors of general (any) and violent recidivism [among sex offenders] were variables related to antisocial orientation, such as antisocial personality, antisocial traits, and a history of rule violation. These are the same risk factors that predict general and violent recidivism among mentally disordered offenders . . . and unselected groups of offenders.”).

54. The precise prevalence of pedophilia among child molesters is difficult to determine because comprehensive efforts to study this issue have been lacking. See T. Howard Stone, William J. Winslade & Craig M. Klugman, *Sex Offenders, Sentencing Laws and Pharmaceutical Treatment: A Prescription for Failure*, 18 Behavioral Sci. L. 83, 87 (2000) (“[O]f the data that is collected, no insight is provided as to whether offenders are known to have a pedophilia disorder: the criteria currently used to measure sex offenses involving children as victims or to base a criminal conviction thereupon under state laws [d]o not include such a finding.”).

55. Simon, *supra* n. 50, at 289.

56. *Id.*

57. *Id.*

vism rate was between 13 and 14% over a 5-year period.⁵⁸ The overall recidivism rate for the same group was over 36%.⁵⁹

Although the general risk of sexual recidivism is relatively low, two factors are associated with greatly increased risk: the presence of "deviant sexual interests," or paraphilia, and the presence of antisocial orientation.⁶⁰

Deviant sexual interests have been described as "enduring attractions to sexual acts that are illegal (e.g., sex with children, rape) or highly unusual (e.g., fetishism, autoerotic asphyxia)."⁶¹ The American Psychiatric Association describes this condition as paraphilia. To be diagnosed as a paraphiliac, the subject must experience "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner, or (3) children or other nonconsenting persons that occur over a period of at least 6 months" and that cause "clinically significant distress or impairment in social, occupational, or other important areas of functioning."⁶² With respect to child molestation, the form of paraphilia that creates the greatest risk of recidivism is pedophilia, which is characterized by intense, recurrent fantasies and urges concerning sex with prepubertal children.⁶³

Sex crimes are, by their very nature, sexually deviant. But the commission of a sex offense is not, in itself, sufficient to classify an offender as a paraphiliac.⁶⁴ As noted above, the data indicate that most child molesters and rapists are not, in fact, paraphiliacs.⁶⁵ For nonparaphiliac offenders, the sex offense is a crime of opportunity rather than an expression of an enduring preference for a deviant form of sexual conduct.

The second major risk factor, antisocial orientation, involves characteristics that many sex offenders share with criminals generally: impulsivity, unemployment, a history of substance abuse, a history of rule violation,

58. See Hanson & Morton-Bourgon, *supra* n. 53, at 1158 (13.7%); R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. Consulting & Clinical Psychol. 348, 351 (1998) (13.4%).

59. See Hanson & Morton-Bourgon, *supra* n. 53, at 1158 (36.2%); Hanson & Bussiere, *supra* n. 58, at 351 (36.3%). Cf. Simon, *supra* n. 50, at 283 ("Among those researchers who measure versatility of offending, though, there is a consensus that the pure sex offender is a rarity; instead, sex offenses are single or infrequent and often are embedded in an extensive criminal history of property and violent crimes.").

60. E.g. Hanson & Morton-Bourgon, *supra* n. 53, at 1154; Craig et al., *supra* n. 46, at 79 ("A review of the studies on sexual recidivism reveals a consistent pattern of prior criminal history, deviant sexual interests, personality disorders and extrafamilial male victims as being positively associated with sexual recidivism.").

61. Hanson & Morton-Bourgon, *supra* n. 53, at 1154.

62. Am. Psychiatric Assn., *supra* n. 52, at 566.

63. See *id.* at 571; Stone et al., *supra* n. 54, at 90.

64. Hanson & Morton-Bourgon, *supra* n. 53, at 1154 ("Although all sexual offending is socially deviant, men who commit such acts do not necessarily have enduring preferences for such behavior."); Stone et al., *supra* n. 54, at 91 ("Nor would an incidence of child sexual abuse or a sex offense involving a child as a victim suffice to diagnose a perpetrator as a pedophile.").

65. See *supra* nn. 54–57 and accompanying text.

pro-offense attitudes, association with other criminals, etc.⁶⁶ When these characteristics are sufficiently strong and persistent, they are sometimes classified as “antisocial personality disorder.”⁶⁷

It appears that deviant sexual interests (i.e. paraphilia) and antisocial orientation are independent risk factors. That is, each creates a risk of recidivism for reasons unrelated to the risk posed by the other. Paraphiliacs are at high risk of re-offending because they have an enduring sexual preference for illegal conduct (e.g., sex with children, sexual torture, etc.), combined with compulsive fantasies and urges related to this illegal conduct.⁶⁸ Persons with antisocial orientations, on the other hand, pose a risk because of their general willingness to violate the rights of others.⁶⁹ They may not prefer to achieve sexual gratification through rape or child molestation, but they are willing to do so if the opportunity arises.⁷⁰ Of course, some offenders are both antisocial and paraphiliac. Such offenders appear to pose a very great risk of recidivism.⁷¹

C. *What Do We Know about Chemical Castration?*

Medroxyprogesterone acetate (MPA) is a synthetic female hormone marketed under the trade name Depo-Provera. MPA has been FDA-approved for use by women as a contraceptive, and its manufacturer (Pfizer) has warned that the product “is indicated only for the prevention of pregnancy.”⁷² The FDA has not approved MPA for use in men, for any purpose, because there have been no long-term clinical trials that show it to be safe and effective for men.⁷³ Nonetheless, once a drug has been approved for a particular use, the Food, Drug and Cosmetic Act permits doctors to prescribe it for unapproved uses as well.⁷⁴ Thus, over the last several decades,

66. E.g. Hanson & Morton-Bourgon, *supra* n. 53, at 1154.

67. See *supra* n. 52 and accompanying text.

68. See Hanson & Morton-Bourgon, *supra* n. 53, at 1154.

69. *Id.*

70. Furthermore, studies indicate that the presence of sexual deviancy does not increase the risk of nonsexual recidivism. See e.g. *id.* at 1158.

71. Maletzky & Field, *supra* n. 45, at 392.

72. Pfizer, *Depo-Provera CI Label 2*, http://www.fda.gov/medwatch/SAFETY/2004/Depo_Provera_Label.pdf (Nov. 2004) [hereinafter *FDA Label*].

73. See e.g. Fabian M. Saleh & Fred S. Berlin, *Sex Hormones, Neurotransmitters, and Psychopharmacological Treatments in Men with Paraphilic Disorders*, 12 J. Child Sexual Abuse 233, 240 (2003) (noting that MPA and similar hormone therapies “are not approved by the U.S. Food and Drug Administration” for suppressing male sex drive because they have “not been adequately studied” in this context).

74. See Fitzgerald, *supra* n. 15, at 6 n. 24 (“Under the Federal Food, Drug and Cosmetic Act, a manufacturer can only label, promote, and advertise a drug for the uses which the drug has been proved to be safe and effective. This requires the manufacturer to submit the drug for clinical trials, the results of which will be reviewed by the Food and Drug Administration. Once a drug has been marketed, the Food, Drug and Cosmetic Act does not limit the manner in which a doctor may present the drug. Such ‘unapproved’ or ‘unlabelled’ uses are reported in the scientific journals and become part of accepted therapies. If the manufacturer is so inclined, he may then un-

a number of doctors have studied using MPA as a kind of treatment for paraphiliacs.⁷⁵ The typical dosage for paraphiliacs ranges from 100 mg/week to 500 mg/week,⁷⁶ whereas the recommended dosage for use as a female contraceptive is "150 mg . . . every 3 months (13 weeks)."⁷⁷ In other words, the dosage used to eliminate male sex drive is anywhere from 8.6 to 43.3 times the recommended dose for use as a female contraceptive—a fact which is potentially significant in light of MPA's severe side effects (discussed below).

When used in men, MPA works as an antiandrogen that "reduces the production and effects of testosterone,"⁷⁸ and causes testosterone to be metabolized (and thus eliminated from the system) more quickly.⁷⁹ The overall effect is to "[reduce] the level of androgen in the blood stream to that of a prepubescent male."⁸⁰

MPA acts directly on the brain by drastically reducing its exposure to testosterone.⁸¹ Testosterone is considered crucial to the "regulation of sexuality, aggression, cognition, emotion and personality," and is "the major activator element of sexual desire, fantasies and behavior."⁸² By reducing the brain's exposure to testosterone, MPA suppresses "sexual fantasies, sexual urges, and sexual drive,"⁸³ and thus induces a state of "erotic apathy."⁸⁴ It has the same effect on "both deviant and non-deviant sexual behavior."⁸⁵

No one knows what causes a person to develop a paraphilic disorder such as pedophilia.⁸⁶ It is fairly clear, however, that paraphiliacs do not have abnormal levels of testosterone.⁸⁷ Nonetheless, because this disorder is characterized by recurrent, intense (and often unwanted) thoughts and urges

dergo the requirements to have the drug approved for the new usage under 21 CF ch. 1, pt. 312 (4-1-88 edition).").

75. Maletzky & Field, *supra* n. 45, at 397–98.

76. Saleh & Berlin, *supra* n. 73, at 242.

77. *FDA Label*, *supra* n. 72, at Dosage and Administration.

78. Fitzgerald, *supra* n. 15, at 2–3.

79. See Fitzgerald, *supra* n. 15, at 6 ("MPA inhibits the release of the follicle-stimulating hormone and the luteinizing hormone from the anterior pituitary gland in the brain. This results in a decrease in testosterone production in the testicles. MPA interferes with the effects of the testosterone and accelerates the metabolism of testosterone in the body."). See also Saleh & Berlin, *supra* n. 73, at 241.

80. Fitzgerald, *supra* n. 15, at 6.

81. See *id.* ("MPA, like all progestinic hormones, acts directly on the brain.").

82. Rösler & Witztum, *supra* n. 38, at 45.

83. Stone et al., *supra* n. 54, at 96. See also Saleh & Berlin, *supra* n. 73, at 241 (asserting that MPA "suppresses sexual drive and thereby reduces the intensity and frequency of deviant sexual urges and cravings").

84. Fitzgerald, *supra* n. 15, at 7 (quoting P. Walker, W. Meyer, L. Emory, & A. Rubin, *Antiandrogenic Treatment of the Paraphilias*, in *Guidelines for the Use of Psychotropic Drugs* 435 (1984)).

85. Stone et al., *supra* n. 54, at 96.

86. See Saleh & Berlin, *supra* n. 73, at 234 (noting that "the etiology and pathophysiology of the paraphilias is still under investigation").

87. Rösler & Witztum, *supra* n. 38, at 45.

concerning sex with children, some have considered MPA-induced suppression of testosterone to be a promising option for paraphiliacs. By disabling the sex drive, MPA is supposed to provide the paraphiliac "relief from his compulsive fantasy. Formerly insistent and commanding urges can be voluntarily controlled."⁸⁸ Once the compulsive fantasies are eliminated, the thinking goes, the paraphiliac should be "more amenable to psychotherapy that can enable him to adjust to a new lifestyle."⁸⁹

Prior research concerning surgical castration has given researchers reason to believe that its chemical analogue would be effective. Like chemical castration, surgical removal of the testes has the effect of eliminating virtually all testosterone from the system, and thus disabling the sex drive.⁹⁰ During the Nazi era, the German government surgically castrated all sex offenders convicted of certain crimes.⁹¹ A follow-up study of this group of offenders indicated a recidivism rate of 2.3%.⁹² Similarly, in the 1970s, the Federal Republic of Germany permitted sex offenders to agree to surgical castration in return for reduced sentences.⁹³ An eleven-year follow-up study was conducted on two groups of offenders: those who underwent the treatment, and those who initially volunteered, but backed out.⁹⁴ The recidivism rate for the castrated group was 3%, as compared to 46% for the uncastrated group.⁹⁵ Other European countries employed surgical castration on sex offenders during the middle decades of the twentieth century, with similar levels of success.⁹⁶

Chemical castration via MPA seems to hold the promise of reducing recidivism to the same extent as surgical castration, since it, too, drastically reduces testosterone levels. There is some evidence that this is the case; for example, some clinicians have reported that paraphiliacs who underwent chemical castration reported a significant reduction in sexual fantasies and sexual urges.⁹⁷ But the data does not clearly indicate that these reductions translate into a long-term reduction in recidivism. Studies of the effect of chemical castration on paraphiliacs have been largely characterized by

88. Fitzgerald, *supra* n. 15, at 6–7.

89. *Id.* at 3.

90. Bailey & Greenberg, *supra* n. 15, at 1229–30.

91. *Id.* at 1232.

92. *Id.*

93. *Id.* at 1234.

94. *Id.*

95. *Id.*

96. *See id.* at 1230 (noting that twenty studies of surgically castrated sex offenders, which collectively covered approximately 5,000 offenders, indicated an average recidivism rate of 3%); Rösler & Witzum, *supra* n. 38, at 43 ("Among a series of 11 reports from Denmark, Germany, Sweden, Norway, Holland, Switzerland, and Czechoslovakia, the mean recidivism rate for a total of 3,589 castrated men was 2.2%.").

97. *See* Stone et al., *supra* n. 54, at 97 (noting reported "reductions in waking-time preoccupation with sexual fantasies, number of morning erections per week, number of ejaculations per week, plasma T levels, and frequency of paraphilic behaviors").

small sample size, lack of controls, and short follow-up periods.⁹⁸ Moreover, these studies have reported a wide variety of recidivism rates, ranging from 0% to 83%.⁹⁹ Indeed, preliminary results from Oregon's program of mandatory chemical castration demonstrate no differences in recidivism between offenders who underwent chemical castration and those who did not.¹⁰⁰ Several studies indicate that cognitive-behavioral therapy is as effective as chemical castration in preventing recidivism.¹⁰¹

One reason that MPA's effect on recidivism has been difficult to measure is that MPA treatment programs have a high drop-out rate due to the severe side effects.¹⁰² Once a sex offender ceases MPA treatment, sexual urges and fantasies—including deviant ones—appear to return.¹⁰³ Thus, all other things being equal, offenders who stop receiving MPA become just as likely to re-offend as they were before the treatment.¹⁰⁴

The most significant side effect of MPA treatment appears to be loss of bone mineral density. On November 14, 2004, Pfizer added a "black box warning" to the drug label, stating that prolonged use could result in a sig-

98. See Maletzky & Field, *supra* n. 45, at 398–400 (describing studies).

99. See *id.*; Rösler & Witztum, *supra* n. 38, at 47 (noting that "[i]n a recent review that summarized 334 patients from 11 studies recidivism during MPA treatment ranged from 3 to 83%, with a mean of 27%").

100. Maletzky & Field, *supra* n. 45, at 406.

101. See e.g. Gordon C. Nagayama Hall, *Sexual Offender Recidivism Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. Consulting & Clinical Psychol. 802, 807 (1995) (noting that cognitive-behavioral therapy and hormonal treatment programs—i.e., chemical castration—achieved a reduction in recidivism of approximately 30%); Wood et al., *supra* n. 47, at 36 (summarizing results of several studies indicating similar success rates for cognitive-behavioral therapy and hormonal therapy).

102. Hall, *supra* n. 101, at 807 (noting that the high drop-out rate for chemical castration programs may explain why such programs are no more effective than cognitive-behavioral therapies). Furthermore, it must be noted that these studies involved offenders who volunteered for treatment. It is not at all clear that coercively imposed chemical castration will have a similar effect on recidivism.

103. Fitzgerald, *supra* n. 15, at 7.

104. A bizarre and tragic case that occurred in the late 1990s illustrates the danger involved in ceasing MPA treatment. In 1983, Joseph Frank Smith was convicted of twice raping the same woman in her home (he was caught during his attempt to victimize her a third time). His crime received great media attention, in part because his habit of committing the crime wearing nothing but a ski mask had earned him the nickname "the Ski Mask Rapist." The court sentenced him to thirty days in prison and ten years of probation, during which period he was to be chemically castrated. He moved to Virginia and started receiving treatment at Johns Hopkins. His initial response to the treatment seemed so good that he was profiled on *60 Minutes*. But probation officials did not adequately monitor his treatment, and did not object when he was discharged. After treatment ceased, he returned to his prior ways, attempting to sodomize a five-year-old girl, and apparently peering or breaking into dozens of homes wearing nothing but a bandanna (a habit that earned him the nickname "the Bandanna Bandit"). In perhaps the strangest twist, Smith married the nurse who had administered his chemical castration shots, and had two daughters with her. Smith was finally arrested when his wife caught him masturbating in the presence of his daughter and friend, both of whom were asleep. See Craig Timberg, *Rapist's Life Stirs Doubt About Drug Treatment*, Washington Post (Dec. 6, 1998).

nificant reduction in bone mineral density,¹⁰⁵ a condition that can lead to osteoporosis or bone fracture. The label further warns that “[b]one loss is greater with increasing duration of use and may not be completely reversible.”¹⁰⁶ Therefore, even when being administered for its FDA-approved use as a contraceptive, Depo-Provera should not be used over the “long-term”—meaning more than two years—unless there is no other option.¹⁰⁷

Other side effects of MPA treatment include “excessive weight gain, malaise, nightmares, headaches, muscular cramps, dyspepsia, gallstones, diabetes mellitus . . . [and] [p]ulmonary embolism.”¹⁰⁸ MPA treatment also results in testicular atrophy,¹⁰⁹ and a dramatic reduction in spontaneous erections and in sperm production.¹¹⁰ It is not clear that these side effects are all reversible—particularly the loss of bone mineral density, which appears to be at least partly irreversible.¹¹¹ The long-term effects of MPA treatment on men are unknown.¹¹²

As with surgical castration, many doctors refuse to prescribe MPA for the purpose of chemically castrating sex offenders, in part because of the severe side effects, and in part because it is a chemical form of maiming.¹¹³ The American Medical Association opposes the procedure where it is imposed by a judge as part of a criminal sentence, rather than prescribed by a physician for the purpose of treating a diagnosed medical condition.¹¹⁴

105. U.S. Food & Drug Administration, *Black Box Warning Added Concerning Long-Term Use of Depo-Provera Contraceptive Injection*, <http://www.fda.gov/bbs/topics/ANSWERS/2004/ANS01325.html> (Nov. 17, 2004).

106. *FDA Label*, *supra* n. 72.

107. *Id.*

108. Rösler & Witztum, *supra* n. 38, at 47; *see also* Saleh & Berlin, *supra* n. 73, at 241 (“MPA can cause a number of potentially serious and less serious adverse effects, including depressive symptoms, breast tenderness and galactorrhea . . . weight gain—apparently secondarily to increased fat deposition . . . nausea, abdominal pain, nightmares, hot flashes, acne, alopecia [hair loss], hirsutism, hyperglycemia, diabetes mellitus, gallstones . . . hypogonadism, hypospermatogenesis, and hypertension”); Stone et al., *supra* n. 54, at 97 (“Side effects include weight gain, fatigue, depression, hot and cold flushes, elevated blood glucose, nausea and gynecomastia, and reduction of spermatogenesis.”).

109. *See* Fitzgerald, *supra* n. 15, at 6–7.

110. Saleh & Berlin, *supra* n. 73, at 241 (noting that MPA “decreases spermatogenesis”); Stone et al., *supra* n. 54, at 96 (chemical castration has the effect of “decreasing morning erections, ejaculation, and spermatogenesis”); Fitzgerald, *supra* n. 15, at 6–7 (chemical castration results in “dramatic decrease in sperm count”).

111. *See FDA Label*, *supra* n. 72 (noting that at least some of the bone mineral density loss experienced by women appeared to be irreversible).

112. Fitzgerald, *supra* n. 15, at 9.

113. Maletzky & Field, *supra* n. 45, at 399.

114. *See* Am. Med. Assn., Council on Ethical & Jud. Affairs, *Court-Initiated Medical Treatments in Criminal Cases*, Rpt. 4-A-98 (1998); *See also* AMA Code of Med. Ethics, *Court-Initiated Medical Treatments in Criminal Cases*, E-2.065 (1998).

II. CHEMICAL CASTRATION LAWS

A. *The Politics of Castration*

On September 17, 1996, Governor Pete Wilson of California approved the nation's first chemical castration law. This law requires that certain sex offenders undergo chemical castration via MPA or its chemical equivalent. Governor Wilson's public statements during the signing ceremony revealed much about the politics and purposes of this law. First, Wilson described sex offenders as an enemy with whom we are at war: "I have a message for those skulking in the shadows. You better stay in the shadows or leave this state, because we will not tolerate your conduct. . . . We are going to win this fight. We are not going to concede one inch of any playground in any neighborhood to vicious predators."¹¹⁵ Later in the same ceremony, however, he described sex offenders as victims of an illness: "Child molesters can't stop because they have a compulsion to do what they do. . . . And as long as they have that urge, they'll keep on victimizing children—unless we do something about it."¹¹⁶

The Governor's message reflects the dual nature of the public perception of sex offenders. On the one hand, sex offenders are often portrayed as "vicious predators," depraved criminals who have no conscience, and who will not stop victimizing children until we make them stop. On the other hand, they are often described as suffering from a compulsive sexual disorder such as pedophilia. They may want to stop victimizing children, but they cannot resist their compulsion to do so. Although these two views of sex offenders are in tension, they are often presented together, in a way that tends to reinforce the perception of sex offender dangerousness. Evil people may be deterred by the threat of punishment, and sick people may seek treatment for their illness. But those who, like sex offenders, seem to embody a kind of "perfect storm" of illness and evil may seem beyond the reach of normal modes of punishment or treatment. The appeal of chemical castration, therefore, arises from its perceived ability to go beyond the normal modes by simultaneously treating and punishing sex offenders, eliminating their sexual compulsion while exacting a particularly severe kind of retribution.

Chemical castration seems to promise one further benefit, perhaps the most powerful of all: it should incapacitate sex offenders, making them incapable of committing future sex offenses. The intended purpose and effect of chemical castration is to eliminate the sex drive by drastically reducing the offender's desire and capacity to engage in any form of sexual activity.

115. *Wilson in Van Nuys to Sign Chemical Castration Bill for Child Molesters*, City News Serv. (L.A., Cal.) (Sept. 17, 1996) (available at LEXIS, News & Bus., Individual Publications folder, City News Serv. file).

116. *Wilson Signs Chemical Castration Bill*, United Press Intl. (D.C.) (Sept. 17, 1996) (available at LEXIS, News & Bus., Individual Publications folder, UPI file).

Whether the offender has a sexual disorder, is an evil or antisocial person, or has some combination of these qualities, chemical castration seems to promise to render him safe, and at considerably less expense than housing him in a prison or secure mental health facility.¹¹⁷

B. Key Features of Chemical Castration Laws

1. California-Style Statutes

California's chemical castration law was both the first in the nation, and the model for most of the chemical castration laws that followed it. In California, one becomes eligible for chemical castration by committing (or aiding and abetting another in committing) one of several forms of forcible or statutory rape upon a victim who is 12 years old or younger.¹¹⁸ After a first offense, the court has discretion to order chemical castration as a condition of parole;¹¹⁹ after a second offense, it becomes mandatory.¹²⁰

Where a court orders chemical castration, California law requires the administration of MPA or its equivalent.¹²¹ The treatment is to start one week prior to the offender's release from confinement (prison or other institution), and must continue "until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary."¹²² There is no statutory requirement that a doctor (or any other medical professional) determine the treatment to be medically appropriate, or even medically safe; nor is there any requirement that the sex offender be diagnosed with a sexual disorder. There is no informed consent requirement. Although the offender has the right to be informed of the effects of the treatment, he does not have the right to refuse it.¹²³ A patient can only escape an order for chemical castration by undergoing a "permanent, surgical alternative"—i.e., surgical castration.¹²⁴

Four states—Florida, Iowa, Louisiana, and Montana—have enacted chemical castration laws modeled after California's law.¹²⁵ Like California,

117. As noted above, given the lack of long-term studies and the high drop-out rate associated with chemical castration, it is not clear that it actually can deliver on this promise.

118. Cal. Pen. Code Ann. § 645(a)–(c) (West 2006).

119. *Id.* at § 645(a).

120. *Id.* at § 645(b).

121. *Id.* at § 645(a), (b).

122. *Id.* at § 645(d).

123. *Id.* at § 645(f).

124. *Id.* at § 645(e).

125. See Fla. Stat. § 794.0235 (2006); Ga. Code Ann. § 16-6-4 (repealed 2006); Iowa Code § 903B.10 (2006); La. Rev. Stat. Ann. § 15:538 (West 2006); Mont. Code Ann. § 45-5-512 (2006). As noted above, the state of Georgia also enacted a chemical castration law similar to California's, but the statute was amended in 2006 to remove all references to chemical castration. The legislative staff working for the amendment's sponsor has indicated that the removal of these provisions was based on a "policy decision," but has declined to provide the reasons for this decision.

these states define eligibility for chemical castration primarily in terms of the offense of conviction, victim age, and recidivism.

In all four states, as in California, the main criterion for determining eligibility for chemical castration is conviction for a specified sex offense. Some statutes include a broad range of offenses, whereas some are much narrower. For example, Iowa permits chemical castration for crimes ranging from indecent contact to sexual exploitation of a child,¹²⁶ but Florida permits chemical castration only for sexual battery.¹²⁷

Three of the four states further limit eligibility for chemical castration to those whose victim is below a certain age. Two states (Iowa and Louisiana) follow California in requiring that the victim be 12 years old or younger,¹²⁸ and one (Montana) requires that the victim be 15 years old or younger.¹²⁹

All of these states also give weight to recidivism. Florida and Iowa, like California, make chemical castration mandatory after a second conviction for a specified sex offense.¹³⁰ In Montana and Louisiana, on the other hand, those offenders who receive a second conviction for a specified sex offense become eligible for chemical castration even though their victims are adults.¹³¹

In contrast to California, three of the four states require some kind of minimal medical review before treatment is imposed.¹³² No statute, however, requires involvement of a physician, nor requires that the sex offender be diagnosed with a sexual disorder before undergoing chemical castration. And none of the states require informed consent by the offender. Two states (Louisiana and Montana) require that the offender be informed of the effects of the procedure, but do not require consent.¹³³ The other two states (Florida and Iowa) do not require that the offender be informed of the effects of chemical castration; nor do they require consent.

All four states' chemical castration laws require that the treatment begin shortly before the offender is released from prison, and all imply that treatment should continue, in most cases, for the life of the defendant. Florida permits the court to order the treatment to continue for any period of

126. Iowa Code § 903B.10(1), (3).

127. Fla. Stat. § 794.0235(1)(a).

128. Iowa Code § 903B.10(3); La. Rev. Stat. Ann. § 15:538(C)(1)(a).

129. Mont. Code Ann. § 45-5-512(1).

130. Fla. Stat. § 794.0235(1)(b); Iowa Code § 903B.10(1).

131. La. Rev. Stat. Ann. § 15:538(C)(1)(b); Mont. Code Ann. § 45-5-512(2).

132. Fla. Stat. § 794.0235(2)(a); Ga. Code Ann. § 16-6-4(d)(2) (repealed 2006); La. Rev. Stat. Ann. § 538(C)(2)(a)–(b)(i); Mont. Code Ann. § 45-5-512. Iowa's chemical castration law does not explicitly require medical review before imposition of chemical castration as a condition of release, although it does provide for an "assessment" to determine whether chemical castration would be "effective" before requiring a court to impose chemical castration after a second conviction. Iowa Code Ann. § 903B.10(1).

133. La. Rev. Stat. Ann. § 15:538(C)(4); Mont. Code Ann. § 45-5-512(5).

time, up to and including the life of the defendant.¹³⁴ Two states (Iowa and Montana) follow California in providing that the treatment should continue until the state determines it is no longer "necessary."¹³⁵ Only Louisiana, which provides that the treatment should continue "during incarceration and any suspended sentence, probation, or parole, unless it is determined that the treatment is no longer necessary,"¹³⁶ appears to provide any mandatory temporal limitation on the administration of MPA treatment. As discussed above, sexual drive and sexual fantasies (including deviant drives and fantasies) appear to return shortly after MPA treatment ceases; therefore, it is difficult to imagine a scenario in which the state, after deciding that an offender needed chemical castration, would later decide that it was "no longer necessary." Therefore, in most cases, the offender will be subjected to a life term of chemical castration.

Three states (Florida, Iowa and Louisiana) follow California in permitting offenders to avoid chemical castration by undergoing surgical castration.¹³⁷ Two states (Iowa and Louisiana) require the offender to pay the costs associated with MPA treatment.¹³⁸

2. *The Oregon Approach*

In contrast to the California-style statutes, Oregon's chemical castration law does not call for imposition of this treatment as part of an offender's sentence. Rather, the Oregon law calls for the establishment of a "pilot program" for determining the efficacy of chemical castration in preventing recidivism.¹³⁹ Under this program, the Department of Corrections is supposed to choose forty to fifty persons to undergo "hormone or antiandrogen, such as medroxyprogesterone acetate, treatment."¹⁴⁰

The statutory criteria for identifying candidates for this treatment are: (a) they must have been convicted of a "sex crime," (b) they must be within six months of release, and (c) the Department of Corrections must determine that they are "most likely to benefit" from chemical castration.¹⁴¹ After the candidates are selected, they must be referred to a physician to assure that chemical castration is not "medically contraindicated."¹⁴² The candidates who make it through this screening process are then required to undergo chemical castration as a mandatory condition of parole or post-prison supervision.¹⁴³ Although the offender has a right to be informed of the ef-

134. Fla. Stat. § 794.0235(2)(a).

135. Iowa Code § 903B.10(4); Mont. Code Ann. § 45-5-512(4).

136. La. Rev. Stat. Ann. § 15:538(C)(3)(d).

137. Fla. Stat. § 794.0235(1)(b); Iowa Code § 903B.10(1); La. Rev. Stat. Ann. 15:538(C)(8).

138. Iowa Code Ann. § 903B.10(5); La. Rev. Stat. Ann. § 15:538(C)(5).

139. Or. Rev. Stat. Ann. § 144.625(1) (2006).

140. *Id.*

141. *Id.* at § 144.625(2)(a)–(b).

142. *Id.* at § 144.625(2)(c).

143. *Id.* at § 144.625(3).

fects of the treatment, he does not have the right to withhold consent.¹⁴⁴ The offender must pay for the treatment himself,¹⁴⁵ and must continue the treatment during “all or a portion of parole or post-prison supervision.”¹⁴⁶

3. *The Wisconsin Approach*

The Wisconsin chemical castration law is much broader and more standardless than the laws enacted in other states. It contains two basic components: First, it permits the Department of Corrections and the Parole Commission to require that a “serious child sex offender”—that is, a person who has been convicted of sexual assault on a child under the age of 13¹⁴⁷—undergo chemical castration as a condition of probation or parole.¹⁴⁸ Second, it requires that before a court grants a petition for release from civil commitment under Wisconsin’s Sexually Violent Persons Commitment Act, it must order the Department of Corrections to put together a treatment plan that addresses the offender’s “need” for chemical castration after release.¹⁴⁹ In both the parole and the civil commitment settings, the decision to release must be made independently of the decision to chemically castrate; the fact that an offender is willing to be chemically castrated, or is an appropriate candidate, should not be counted in his favor.¹⁵⁰

4. *The Texas Approach (Voluntary Surgical Castration)*

In stark contrast to the seven “chemical castration” states, Texas permits certain sex offenders to obtain *surgical* castration on a purely voluntary basis.¹⁵¹ To be eligible for this surgery, the offender must meet all of the following criteria: (1) he must have been convicted at least twice of indecency with a child, sexual assault of a child, or aggravated sexual assault; (2) he must be at least 21 years old; (3) he must request the procedure in writing; (4) he must admit to his last crime in writing; (5) he must receive an evaluation and counseling from both a psychiatrist and a psychologist, both of whom must have experience dealing with sex offenders; (6) he must give written, informed consent; and (7) he must not have previously requested the procedure and then withdrawn the request.¹⁵²

As an added layer of protection, the inmate is also required to meet with an independent monitor with expertise in mental health, law, and eth-

144. *Id.* at § 144.627(1)(a).

145. *Id.* at § 144.629.

146. *Id.* at § 144.625(3).

147. Wis. Stat. § 304.06(1q)(a) (2006).

148. *Id.* at § 304.06(1q)(b).

149. *Id.* at § 980.08(5). Proposed legislation may repeal Wis. Stat. § 980.08(5). See Wis. Assembly 1901, 97th Leg., 2005–2006 Reg. Sess. § 121 (Mar. 7, 2006).

150. *Id.* at §§ 304.06(1q)(c), 980.08(4)(c).

151. Tex. Govt. Code Ann. § 501.061 (West 2006).

152. *Id.* at § 501.061(a)(1)–(7).

ics.¹⁵³ The monitor is required to perform two basic functions: (1) ensure that the inmate has received adequate information about the orchiectomy, and provide him with supplemental information if necessary; and (2) determine whether the inmate has been coerced into requesting the procedure, and advise him to withdraw his request if the monitor believes he has been coerced.¹⁵⁴ Additionally, the inmate is permitted to withdraw his request any time prior to surgery, but may not renew the request once it has been withdrawn.¹⁵⁵

The Texas statute does not provide any benefit to the inmate, such as early release, as a *quid pro quo* for undergoing surgical castration. Moreover, judges and the parole panel are specifically forbidden from requiring a sex offender to undergo an orchiectomy as a condition of community supervision or parole.¹⁵⁶

C. Implementation and Continuing Politics

1. Implementation Issues—Florida and Oregon

Information concerning attempts to implement the chemical castration statutes appears to be available only for Florida and Oregon. The experience of those two states, however, indicates a number of serious difficulties associated with the imposition of chemical castration sentences.

As of April 2005, less than 10% of the Florida sex offenders who were statutorily required to receive sentences of chemical castration had actually received such sentences, largely because many judges and lawmakers are not aware of the existence of the chemical castration law.¹⁵⁷ Florida courts have also had significant difficulty complying with statutory requirements for imposing sentences under this law.¹⁵⁸

Florida's experience reveals a number of issues surrounding the medical review requirement most chemical castration statutes mandate. As noted above, Florida law requires that a "court appointed medical expert" determine, within sixty days of sentencing, that the defendant "is an appropriate

153. *Id.* at § 501.061(a)(8), (f).

154. *Id.* at § 501.061(f).

155. *Id.* at § 501.061(b).

156. Tex. Govt. Code Ann. § 508.226; Tex. Crim. Pro. Ann. art. 42.12 § 11(f) (West 2006).

157. Larry Keller, *Chemical Procedure for Sex Offender Weighed*, Palm Beach Post 1B (Aug. 30, 2005) (describing Florida Department of Corrections data regarding enforcement of chemical castration laws).

158. See *Jackson*, 907 So. 2d 696 (overturning chemical castration sentence because medical review did not occur within sixty days of sentence and because judge failed to specify duration of sentence); *Dept. of Corrections v. Cosme*, 917 So. 2d 1049 (Fla. 5th Dist. App. 2006) (overturning district court's order requiring Department of Corrections to identify and pay for medical expert to determine defendant's fitness for chemical castration); *Houston*, 852 So. 2d 425 (overturning chemical castration sentence because judge did not appoint a medical expert and did not specify a duration for the sentence).

candidate for treatment.”¹⁵⁹ *Jackson v. State of Florida*¹⁶⁰ is the only reported case that provides a description of this “medical review” in practice. There, the Florida Department of Corrections faxed to the sentencing court a document indicating that “a medical examination” of the defendant indicated that the defendant “‘had no symptoms or problems’ relative to” chemical castration.¹⁶¹ On the basis of this document, the court ordered the defendant to undergo chemical castration after serving concurrent sentences of life imprisonment and fifteen years imprisonment.¹⁶² The appellate court reversed the sentence, however, because the medical review did not occur within sixty days of the imposition of sentence.¹⁶³

Although one case is certainly not sufficient to show a consistent practice, *Jackson* does reveal certain issues and ambiguities surrounding Florida’s “medical review” requirement (and, by implication, the medical review provisions in the other “California-style” statutes). First, it is not clear who the “medical expert” should be. In *Jackson*, this “expert” appears to have been part of the medical staff at the Department of Corrections—possibly a doctor, but possibly not. Second, the statute sets no criteria for determining who is an “appropriate candidate” for chemical castration. In *Jackson*, the medical review was apparently limited to determining whether the defendant could physically tolerate the MPA treatment. There seems to have been no attempt to determine whether he had paraphilia, which is the only male condition for which MPA has been shown to have therapeutic value. Third, the statute requires that the medical review occur close to the time of sentencing, but the treatment is not supposed to begin until a week prior to release. Thus, there will often be a gap of many years, or even decades, between medical review and treatment. Under such circumstances, even a mere determination that the defendant can physically tolerate the medication will no longer be valid at the time treatment commences. The statute does not call for any subsequent medical review at the time treatment starts, nor any ongoing assessment during the time treatment continues.

In contrast to Florida, Oregon has made a significant effort to develop screening criteria to identify those offenders who should receive chemical castration. The criteria Oregon has chosen, however, are troubling in their own way. The Oregon program uses “three independent screening criteria” to determine who should be chemically castrated: (1) risk to re-offend; (2) presence of a central nervous system dysfunction, such as a developmental disability (because the presence of such a dysfunction in a person who has committed a sex offense is thought to increase the likelihood of recidivism);

159. Fla. Stat. Ann. § 794.0235(2)(a).

160. 907 So. 2d 696.

161. *Id.* at 697.

162. *Id.* at 696–97.

163. *Id.* at 697.

and (3) referral from prison counselors, parole officers, or other state officials.¹⁶⁴ Using these criteria as a benchmark, those offenders who are considered particularly dangerous are recommended for chemical castration.

Oregon's criteria for implementing chemical castration are based purely on risk assessment, rather than diagnosis of a sexual disorder. As discussed above, many (if not most) "high-risk" sex offenders do not have any kind of sexual disorder; rather, the majority have at least some characteristics associated with an antisocial orientation or personality. But MPA treatment has only been tested and shown to have therapeutic value for offenders diagnosed with a form of paraphilia. Specifically, it is supposed to help paraphiliacs control persistent, deviant sexual urges and fantasies. By focusing exclusively on risk, Oregon's program will impose chemical castration on many people who do not have a sexual disorder, but are antisocial—that is, people who commit sex crimes because of a general willingness to violate the rights of others. MPA treatment may successfully incapacitate this group by eliminating their (healthy) sex drives; but it is not even arguably medically appropriate.

As of November 1, 2001, Oregon's program demonstrated little difference in recidivism among those offenders who received chemical castration and those who did not.¹⁶⁵ No one from either group of offenders had yet been recharged with a sexual offense, a fact that may be attributed to small sample size and relatively short follow-up period (two years or less for all offenders).¹⁶⁶ More significantly, preliminary results indicated that chemical castration had no effect on nonsexual recidivism.¹⁶⁷ Nearly the same percentage of chemically castrated offenders (50%) had nonsexual probation violations as untreated offenders (48.4%).¹⁶⁸ To the extent that nonsexual crime reflects antisocial orientation, it appears that chemical castration has no effect on this orientation.¹⁶⁹

Oregon has had significant difficulty in implementing its chemical castration program. As of 2002, 15 of the 42 sex offenders who had been recommended for chemical castration had not yet received it.¹⁷⁰ Two major reasons for this problem were that the offenders could not afford the treatment, or could not find a doctor willing to prescribe MPA for purposes of chemical castration.¹⁷¹

164. Maletzky & Field, *supra* n. 45, at 405.

165. *Id.* at 406.

166. *Id.* at 405–06.

167. *Id.* at 406–07.

168. *Id.* at 406.

169. This result is consistent with studies showing that sex offenders who are antisocial tend to have a long history of nonsexual crimes, whereas paraphiliacs typically do not. *See generally* e.g. Simon, *supra* n. 50, at 294.

170. Maletzky & Field, *supra* n. 45, at 405.

171. *Id.* Two offenders simply refused treatment. *Id.* at 406. It is not clear whether they were reincarcerated for their refusal.

2. Continuing Politics of Castration

Despite the manifest difficulties in implementing the chemical castration laws, and despite the lack of any evidence that they have been effective in furthering public safety, there is nonetheless a consistent push to enact such laws in other states. Every year, several states consider enacting a chemical castration law.¹⁷² Moreover, within the past year, Virginia, Alabama, and Kentucky have considered laws that would permit imposition of surgical castration on sex offenders.¹⁷³ Such laws enjoy continued popularity because they promise to protect public safety by disabling convicted offenders and deterring would-be offenders, all at much less cost than incarceration or civil commitment. Until the unconstitutionality of these laws is determined with certainty, they will be an increasingly common feature of the political landscape.

III. CHEMICAL CASTRATION AND THE EIGHTH AMENDMENT

The Eighth and Fourteenth Amendments to the United States Constitution prohibit federal and state¹⁷⁴ governments from inflicting "cruel and unusual punishments" on those convicted of crime.¹⁷⁵ Although the Supreme Court has never comprehensively defined what it means for a punishment to be "cruel and unusual,"¹⁷⁶ it has repeatedly declared that the main purpose of this clause is to prevent the government from imposing

172. Recent examples of states that have considered proposals for chemical castration laws include Minnesota, Oklahoma, Pennsylvania, and Vermont. See e.g. Rachel E. Stassen-Berger, *Chemical Castration Proposed—Measure Makes It a Sentence for Pedophiles Whose Victims are Younger Than 13*, Pioneer Press (St. Paul, Minn.) A18 (Feb. 18, 2005); Kelley Chambers, *Chemical Castration, Corrections Bills Begin Oklahoma Senate's First Week of Session*, J. Rec. Legis. Rpt. (Okla. City, Okla.) (Feb. 13, 2006); Rebekah Scott, *Senator Drafting Legislation to Treat Sex Offenders with Drug*, Pitt. Post-Gaz. (Pa.) (Dec. 22, 2005); Ed Shamy, *For Boys, Legislation a Cut Above*, Burlington Free Press (Vt.) 1B (Jan. 31, 2006).

173. See e.g. Tammie Smith, *Castration Bill Delayed a Year; Crime Commission Will Be Asked to Study Sex-Predator Measure*, Richmond Times-Dispatch 2A (Feb. 10, 2006); Alabama: *First We'll Castrate 'Em, Then We'll Kill 'Em, Then; We'll Castrate 'Em Again!*, Hotline, Natl. Journal's Daily Briefing on Politics (D.C.) (July 27, 2005); Lt. Gov. Pence Commits to Strengthening Kentucky Sexual Offender Laws, U.S. Sts. News (Sept. 20, 2005).

174. The Eighth Amendment's prohibition of cruel and unusual punishments has been incorporated into the due process clause of the Fourteenth Amendment, and is applicable to the states. See *Robinson*, 370 U.S. at 667 (state punishment for narcotics addiction "inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment"); cf. *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth Amendment would prohibit, by its due process clause, execution by a state in a cruel manner.").

175. U.S. Const. amend. VIII.

176. See e.g. *Furman*, 408 U.S. at 258 (Brennan, J., concurring) ("The Cruel and Unusual Punishments Clause . . . is not susceptible of precise definition."); *Weems*, 217 U.S. at 368 ("What constitutes a cruel and unusual punishment has not been exactly decided."); *Wilkerson*, 99 U.S. at 135-36 ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.").

punishments that deny or violate human dignity.¹⁷⁷ In Part III A, I will describe what the concept of human dignity means in the context of the Eighth Amendment, and show how it has shaped the parameters of the Court's jurisprudence with respect to inherently cruel punishments. In Part III B, I will use the Court's focus on human dignity as a lens for examining the constitutionality of the chemical castration laws described above.

A. Cruelty and Human Dignity

All punishment involves the deliberate infliction of pain,¹⁷⁸ but not all punishments are cruel within the meaning of the Eighth Amendment. According to the *Oxford English Dictionary*, an action is "cruel" if it shows "indifference to or pleasure in another's distress."¹⁷⁹ Similarly, the Supreme Court has often stated that punishment is unconstitutionally cruel if it involves "the unnecessary and wanton infliction of pain,"¹⁸⁰ terror,¹⁸¹ disgrace,¹⁸² or degradation.¹⁸³

These definitions imply that the line between non-cruelty and cruelty depends, in part, on the attitude of those who impose punishment toward those who receive it. A punishment that is calculated to maximize the offender's suffering as an end in itself, or that treats such suffering as an unimportant matter, is cruel because it implies that the offender is not a proper subject of our concern as fellow persons. This idea was developed most fully in Justice Brennan's concurrence in *Furman v. Georgia*:

The barbaric punishments condemned by history, "punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like," are, of course, "attended with acute pain and suffering." When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.¹⁸⁴

177. See *supra* n. 22 and cases cited therein.

178. Indeed, the words "punishment" and "pain" derive from the Latin word *poena*, which refers to the imposition of a fine or other penalty in retribution for an offense. See U. of Notre Dame, *Latin Dictionary and Grammar Aid*, "Poena," <http://catholic.archives.nd.edu/cgi-bin/lookit.pl?latin=poena> (accessed Sept. 16, 2006).

179. *Oxford English Dictionary*.

180. *Gregg*, 428 U.S. at 173. See also *e.g. Hope*, 536 U.S. 730; *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

181. *Wilkerson*, 99 U.S. at 135.

182. *Id.*

183. *Weems*, 217 U.S. at 366.

184. *Furman*, 408 U.S. at 272-73.

As this passage indicates, the Eighth Amendment is predicated upon the belief that human beings do not forfeit their place in the human community by committing crimes, even heinous ones. The offender remains entitled to the respect and concern that is owed to all human beings, even if he also deserves severe punishment. Therefore, the state is not free to dispose of him as it will, but must instead punish him in a manner that accords with the inherent and inalienable dignity of human persons.

The idea that even the worst criminals retain intrinsic human dignity and worth is a departure from the traditional notion that criminals may forfeit their place in the human community through the commission of serious crime. For example, Thomas Aquinas justified capital punishment on the ground that those guilty of serious sin have discarded their dignity and become like beasts:

By sinning man departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free, and exists for himself, and he falls into the slavish state of the beasts, by being disposed of according as he is useful to others. . . . Hence, although it be evil in itself to kill a man so long as he preserve his dignity, yet it may be good to kill a man who has sinned, even as it is to kill a beast. For a bad man is worse than a beast, and is more harmful, as the Philosopher [Aristotle] states.¹⁸⁵

The Eighth Amendment rejects this notion, holding that even serious criminals retain the dignity that is inalienably associated with personhood, and thus retain the right to be punished in accordance with their nature as human persons.

The Supreme Court has employed the concept of human dignity as an Eighth Amendment limit on the state's power to punish in three related contexts. First, the Court has held that punishments that assault the personhood of the defendant, or inflict harm for harm's sake, are inherently cruel and unusual.¹⁸⁶ Second, the Court has held that the Eighth and Fourteenth Amendments deprive the state of the power to impose criminal punishment or civil commitment solely on the basis of a person's undesirable personal characteristics (such as dangerousness).¹⁸⁷ Finally, the Court has

185. St. Thomas Aquinas, *Whether It Is Lawful to Kill Sinners?*, in *Summa Theologica* vol. 2 (Secunda Secundæ Partis) 64:2, 1466, 1466–67 (Fathers of the English Dominican Province trans., Benzinger Bros., Inc. 1947). See also Michael J. Perry, *Capital Punishment and the Morality of Human Rights*, 44 J. Cath. Leg. Stud. 1, 15 (2005) (arguing that under traditional Catholic doctrine, one could forfeit one's human dignity through the commission of serious crime).

186. See *infra* nn. 188–229.

187. See *Robinson*, 370 U.S. at 667–68 (holding that it violates the Eighth and the Fourteenth Amendments to criminally convict a person based on his status as a drug addict); *Kan. v. Crane*, 534 U.S. 407, 412 (2002) (holding that the Constitution does not permit civil commitment absent a finding of mental abnormality and lack of control over dangerous behavior).

struck down punishments that are not inherently cruel, but are grossly disproportionate to the offense.¹⁸⁸

These three areas of the Court's Eighth and Fourteenth Amendment jurisprudence are tied together by the concept of human dignity. Punishment that deliberately inflicts physical harm for harm's sake, or assaults the offender's personhood, is cruel and unusual because it treats the offender as a thing whose suffering is unimportant (or affirmatively desirable) rather than treating him as a member of the human family who deserves our concern—even if he also deserves serious punishment. Similarly, punishment that is given in the absence of voluntary wrongdoing is cruel and unusual because it implies that the offender's moral culpability is irrelevant to the question of whether he deserves punishment. Finally, punishment that is grossly disproportionate to the offense implies that the offender's moral culpability is irrelevant to the question of how much punishment he deserves. In short, each category of punishment treats the offender as a thing rather than a person, whose suffering is unimportant, and whose punishment need not be limited by his objective desert. This article will focus on the first category of cruel and unusual punishment—punishment that is inherently cruel.

The Supreme Court has recognized certain types of punishment to be inherently cruel, and thus constitutionally prohibited. Paradigmatic examples of cruel punishments include the old English practice of dragging traitors to the place of execution, and (if they were convicted of high treason) disemboweling them alive, before beheading and quartering them.¹⁸⁹ Further examples include burning offenders alive,¹⁹⁰ public dissection,¹⁹¹ use of the rack,¹⁹² thumbscrews,¹⁹³ hanging in chains,¹⁹⁴ and (of course) castration.¹⁹⁵ Punishments like these, which involve torture and maiming, are considered inherently cruel, and therefore they are impermissible “always-and-everywhere.”¹⁹⁶

In the twentieth century, the Supreme Court expanded its definition of inherently cruel punishment to include punishments that degrade or deny the personhood of the offender, even if they do not involve physical torture.

188. *Cf. Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (“These decisions recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes . . . second, it proscribes punishment grossly disproportionate to the severity of the crime . . . and third, it imposes substantive limits on what can be made criminal and punished as such.”).

189. *Wilkerson*, 99 U.S. at 135.

190. *Id.*

191. *Id.*

192. *Robinson*, 370 U.S. at 675.

193. *Id.*

194. *Weems*, 217 U.S. at 377.

195. *Id.*; see also *Furman*, 408 U.S. at 265 (Brennan, J., concurring).

196. *Atkins*, 536 U.S. at 349 (2002) (Scalia, J., dissenting).

For example, in *Weems v. United States*,¹⁹⁷ the Court held that it violated the Eighth Amendment to sentence a public official who had been convicted of a strict-liability regulatory offense (putting false information on a government document) to fifteen years imprisonment at “hard and painful labor,” in chains, with no civil rights during confinement and no prospect of ever escaping official surveillance afterward. These conditions were so severe and degrading¹⁹⁸ that they “amaze[d]”¹⁹⁹ the Court, which struck down the sentence as cruel and unusual.²⁰⁰

Similarly, in *Trop v. Dulles*,²⁰¹ the Supreme Court held that it violated the Eighth Amendment to revoke the citizenship of a soldier who received a dishonorable discharge after conviction for wartime desertion.²⁰² In a plurality opinion, Chief Justice Warren acknowledged that wartime desertion was a capital offense, and that therefore there could be “no argument that the penalty of denationalization is excessive in relation to the gravity of the crime.”²⁰³ Nonetheless, he held that this punishment subjected the offender to a “fate forbidden” by the Eighth Amendment.²⁰⁴ Denationalization was, in some ways, a worse punishment than physical torture, because it involved “the total destruction of the individual’s status in organized society.”²⁰⁵ By losing citizenship, the offender was not merely deprived of rights, but of “the right to have rights.”²⁰⁶ This left the offender completely vulnerable: “fair game for the despoiler at home and the oppressor abroad.”²⁰⁷

More recently, the requirement that punishment must accord with basic notions of human dignity has been upheld in cases regarding unconstitutional prison conditions, excessive use of force by prison officials, and use of experimental or psychotropic drugs as a means of controlling prisoner behavior. When imprisoned after conviction for a criminal offense, offenders retain certain civil rights, including the right to free exercise of religion, free speech, and due process, although these rights may be substantially curtailed due to the need for prison security.²⁰⁸ Prisoners also retain the

197. 217 U.S. at 381–89.

198. *Id.* at 366 (“No circumstance of degradation is omitted.”).

199. *Id.*

200. *Id.* at 367 (*Weems* can also be understood as a “gross disproportionality” case, for the Court was clearly concerned about the severity of the punishment in relation to the offense: “[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”).

201. 356 U.S. 86 (1958).

202. *Id.* at 87.

203. *Id.* at 99.

204. *Id.* at 99.

205. *Id.* at 101.

206. *Id.* at 102.

207. *Id.* at n. 33 (quoting with approval lower court *Trop v. Dulles*, 239 F.2d 527, 530 (2d Cir. 1957) (Clark, C.J., dissenting)).

208. *Hudson v. Palmer*, 468 U.S. 517, 523–24 (1984).

right to be free from cruel and unusual punishment.²⁰⁹ The Supreme Court has stated that the protection of inmate rights and dignity is central to the overall preservation of a free society: "The continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society."²¹⁰

Under federal law, prison inmates are permitted to bring suit against prison officials for violation of their constitutional rights,²¹¹ including the right to be free from cruel and unusual punishment.²¹² In adjudicating such suits, the Supreme Court has declared that prison officials are obliged to look after inmate needs for medical care,²¹³ personal safety and security,²¹⁴ nutrition,²¹⁵ sanitation,²¹⁶ warmth,²¹⁷ and exercise.²¹⁸ Indeed, the Court has gone so far as to hold that prison officials have a duty to protect prisoners from serious risk of future harm to their health, as may result from prolonged exposure to second-hand smoke.²¹⁹ If prison officials act with "deliberate indifference"²²⁰ to such "identifiable human need[s],"²²¹ they may be held liable for imposing cruel and unusual punishment.

In cases involving the alleged excessive use of force against an inmate, the Court gives greater deference to prison officials than in cases alleging unconstitutional prison conditions, because force may often be needed to maintain order and safety in the prison environment.²²² Nonetheless, prisoners can maintain a claim that excessive force constitutes cruel and unusual punishment where more than de minimis force was applied

209. *Id.*

210. *Id.*

211. 42 U.S.C.A. § 1983 (West 1996).

212. *Estelle*, 429 U.S. at 105 (1976).

213. *Id.* at 103-04.

214. *Hutto*, 437 U.S. at 685-87; cf. *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."); *Farmer*, 511 U.S. at 837 ("[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.").

215. *Hutto*, 437 U.S. at 686-87.

216. *Id.*

217. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

218. *Id.*; see also *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (holding that practice of "double celling" prison inmates did not constitute cruel and unusual punishment where it "did not lead to deprivations of essential food, medical care, or sanitation," and did not "increase violence among inmates or create other conditions intolerable for prison confinement").

219. *Helling v. McKinney*, 509 U.S. 25 (1993).

220. *Estelle*, 429 U.S. at 104; *Wilson*, 501 U.S. at 297; *Farmer*, 511 U.S. at 837 (holding that "deliberate indifference" standard is met where "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference").

221. *Wilson*, 501 U.S. at 304.

222. *Whitley v. Albers*, 475 U.S. 312 (1986).

"maliciously and sadistically for the very purpose of causing harm."²²³ Thus, for example, the beating of a handcuffed prisoner by guards can constitute an Eighth Amendment violation even where the beating does not result in serious injury.²²⁴ Similarly, prison guards were found to have violated the Eighth Amendment where they handcuffed a prisoner to a hitching post, and thereby "subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation."²²⁵

Finally, several lower court cases have held that it violates the Eighth Amendment to use drugs merely to incapacitate inmates, or punish them for violations of prison rules, even where the drugs are characterized as "aversive therapy" rather than punishment. For example, in *Mackey v. Procunier*, a state prisoner who had been sent to a mental health facility for shock treatment alleged that the hospital gave him injections of a "breath-stopping and paralyzing fright drug"²²⁶ as part of an experiment "to ascertain whether, by instilling of fright and infliction of pain, accompanied by psychological suggestion, behavior patterns can be affected."²²⁷ The Ninth Circuit held that these allegations raised "serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with mental processes,"²²⁸ and therefore reversed the district court's dismissal of the complaint. Similarly, in *Knecht v. Gillman*, an inmate at a mental hospital alleged that hospital officials used a morphine-based, vomit-inducing drug as an experimental "aversive stimuli" to change the behavior of inmates who violated hospital rules.²²⁹ The Eighth Circuit held that this constituted cruel and unusual punishment, at least in the absence of informed consent from the inmates.²³⁰

In a related context, the Supreme Court has held that it violates the Fourteenth Amendment's due process clause to subject prisoners to involuntary medication unless two conditions are met: (1) The medication must be medically appropriate; and (2) the medication must further an overriding state interest that cannot be satisfied via less intrusive means.²³¹ The due

223. *Id.* at 320–21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

224. *Hudson*, 503 U.S. 1.

225. *Hope*, 536 U.S. at 738.

226. 477 F.2d 877, 877 (9th Cir. 1973).

227. *Id.* at 878.

228. *Id.*

229. 488 F.2d 1136, 1140 (8th Cir. 1973).

230. *Id.*

231. *Riggins v. Nev.*, 504 U.S. 127, 135 (1992); *Wash. v. Harper*, 494 U.S. 210 (1990); *cf. Vitek v. Jones*, 445 U.S. 480, 493–94 (1980) ("A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the state to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.").

process concerns surrounding coercive imposition of medical treatment are particularly strong with respect to drugs that affect thought processes or impose severe side effects. As the Fourth Circuit has explained, the coercive imposition of mind-altering drugs to prisoners “has the potential to allow the government to alter or control thinking and thereby to destroy the independence of thought and speech so crucial to a free society.”²³² Similarly, the coercive imposition of drugs with severe side effects creates a substantial danger that the state may be imposing cruel punishment in the guise of “treatment.”²³³ Therefore, in the absence of consent, coercive medical treatment is only permissible where it is both medically appropriate and the least intrusive means to achieve an overriding government interest.

In sum, a punishment will be considered inherently cruel if it involves physical torture or maiming, or constitutes a direct assault on the offender’s dignity and personhood—his “right to have rights.” Moreover, cases involving poor prison conditions, excessive use of force, and involuntary medication confirm that convicted offenders retain the right to be treated in a manner that accords with human dignity. They retain the right to have their “basic needs” looked after, including the need for medical care, personal security, food, warmth, and sanitation. They also retain the right not to be subjected to the malicious use of force employed for the purpose of causing needless pain or humiliation. Finally, they retain the right not to be subjected to involuntary medication for the mere purpose of incapacitation. When any of these rights are deliberately violated, the state treats offenders as beings who are less than human, whose suffering is unimportant, and who may be used (and altered) merely to serve state ends.

B. Is Chemical Castration Cruel and Unusual Punishment?

To determine whether chemical castration (as imposed by the state laws described above) constitutes cruel and unusual punishment, this article will consider the following issues in turn: (1) Is chemical castration sufficiently similar to surgical castration to constitute a paradigmatic example of inherently cruel punishment? (2) To the extent chemical castration differs

232. *U.S. v. Charters*, 829 F.2d 479, 489 (4th Cir. 1987) (“The impact of antipsychotic medication upon the mind may be sufficient to undermine the foundations of personality. Such mind altering medication has the potential to allow the government to alter or control thinking and thereby to destroy the independence of thought and speech so crucial to a free society. ‘[T]he power to control men’s minds’ is ‘wholly inconsistent’ not only with the ‘philosophy of the first amendment but with virtually any concept of liberty.’”) (internal citations omitted); *see also U.S. v. Williams*, 356 F.3d 1045, 1054 (9th Cir. 2004) (noting that antipsychotic drugs affect “cognition, concentration, behavior, and demeanor. . . . [and] [w]hile the resulting personality change is intended to, and often does, eliminate undesirable behaviors, that change also, if unwanted, interferes with a person’s self-autonomy, and can impair his or her ability to function in particular contexts”).

233. *Washington*, 494 U.S. at 241.

from surgical castration, does it nonetheless deny the offender's right to be punished in a manner that accords with human dignity?

1. *Chemical v. Surgical Castration*

Surgical castration is generally considered to be a paradigmatic example of cruel and unusual punishment.²³⁴ Chemical castration is similar to surgical castration, in that both procedures drastically reduce the level of testosterone in the offender's system. By virtually eliminating testosterone, both procedures largely disable the offender's sex drive, including sexual desire, performative capacity, and procreative capacity. Chemical castration differs from surgical castration in two primary ways: it is a pharmacological rather than surgical procedure, and its sexual effects appear to be reversible (although at least some of its side effects do not).

To determine whether the similarities between chemical castration and surgical castration are sufficient to make the two procedures constitutionally equivalent, it is first necessary to consider why surgical castration has been condemned as a paradigmatic example of cruel and unusual punishment.

American courts have consistently described castration as a classic example of cruel and unusual punishment. Indeed, the American Medical Association has declared it to be unethical for doctors to participate in court-ordered castration,²³⁵ and even the European countries that permitted sex offenders to undergo castration in exchange for early release up through the 1970s have now largely stopped doing so (despite the dramatic decreases in recidivism discussed above) because the procedure is considered cruel and barbaric.²³⁶

234. See *supra* n. 195 and cases cited therein; see also *Whitten v. Ga.*, 47 Ga. 297 (1872) (recognizing castration as an inherently cruel form of punishment); *In the Matter of the Application of Lucas Candido for a Writ of Habeas Corpus*, 31 Haw. 982 (1931); *St. v. Bartlett*, 830 P.2d 823, 830 (1992) (disapproved on other grounds by *St. v. DePiano*, 926 P.2d 494, 497 (1996)) (recognizing castration as an inherently cruel form of punishment); cf. *Kenimer v. St. ex rel. Webb*, 59 S.E.2d 296, 309 (Ga. App. 1950) (MacIntyre, J., dissenting) (in which the presiding judge dissented from Court of Appeals ruling that cumulative punishment of three years in prison and an \$11,900 fine for numerous contempt citations was cruel and unusual punishment because it did not involve an inherently cruel punishment, such as castration).

235. See e.g. Am. Med. Assn. H. of Delegates Policy H-140.955, *Court-Ordered Castration* ("The AMA opposes physician participation in castration and other surgical or medical treatments initiated solely for criminal punishment."); Maletzky & Field, *supra* n. 45, at 395 (stating that surgeons are "loath to remove undamaged tissue").

236. See Luk Gijs & Louis Gooren, *Hormonal and Psychopharmacological Interventions in the Treatment of Paraphilias: An Update*, 33 J. Sex Research 273, 273 (1996); see also Maletzky & Field, *supra* n. 45, at 395. One measure of the barbarity of coerced castration may be an examination of its side effects, which include "changes in metabolic processes; loss of protein; augmentation of pituitary functions; augmentation of creatinine found in urine; changes in fat distribution in the body; diminution of the calcium content of bones after a period of time; hot flashes and sweating; multiple diffuse somatic complaints; and diminishment of beard and body hair. Additionally, castrates may exhibit a number of mental effects that require consideration;

Why is this so? Courts and commentators often say that chemical castration is inherently cruel because it is a kind of mutilation. For example, in *State v. Brown*,²³⁷ the Supreme Court of South Carolina voided a trial judge's sentencing order that would have permitted three sex offenders to obtain suspended sentences in exchange for undergoing surgical castration. This order violated public policy, the Court held, because castration was "a form of mutilation," and was thus "prohibited" as a cruel and unusual punishment.²³⁸

It is not absolutely clear, however, that the Framers intended the Eighth Amendment to categorically exclude all forms of mutilation. Branding and the cutting off of ears, for example, were accepted forms of punishment in the colonial period.²³⁹ Indeed, in the congressional debate over adoption of the Eighth Amendment, Samuel Livermore objected on the ground that the Amendment was meaningless:

The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel?²⁴⁰

The very idea that the Eighth Amendment might prohibit such punishments seemed, to Livermore, to have been ridiculous.

If mutilation alone was not sufficient to mark a punishment as inherently cruel and unusual, what makes castration sufficiently harsh to fall within this category? One way to think about the issue is to compare the way the common law treated private parties who committed castration versus those who committed other forms of mutilation. If castration was punished more harshly than other forms of mutilation, this may tell us something about why the government is forbidden by the Eighth Amendment from imposing castration as a form of punishment. According to Blackstone, at common law, castration was the most serious form of the crime of mayhem. Mayhem was defined as "the violently depriving another of the use of such of his members, as may render him the less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage," i.e., the testes, "are held to be

these include depressive reactions, suicidal tendencies, emotional lability, and indifference to life." Stone et al., *supra* n. 54, at 93.

237. 326 S.E.2d 410 (S.C. 1985).

238. *Id.* at 411.

239. Lawrence M. Friedman, *Crime and Punishment in American History* 40 (BasicBooks 1993).

240. *Weems*, 217 U.S. at 369 (quoting Cong. Register p. 225).

mayhems.”²⁴¹ Other kinds of mutilation, on the other hand, including “the cutting off his ear, or nose, or the like” were not considered mayhems at common law.²⁴² Mayhem was considered “an atrocious breach of the king’s peace,” and the typical punishment was fine and imprisonment.²⁴³ But those who committed mayhem by castration were guilty of a capital felony that could be punished by death or exile, and the forfeiture of one’s entire estate.²⁴⁴

It appears that, with respect to mutilation, the common law recognized an ascending scale of seriousness. Simple mutilation was not serious enough to constitute the “atrocious” crime of mayhem. Mutilation that deprived a person of the use of one of his members, and thus made him more vulnerable in a fight, constituted mayhem punishable by fines and imprisonment. Finally, mutilation that deprived a man of his very courage or manhood—that is, castration—was a capital offense, treated just as harshly as murder.

The idea that private parties who subject others to castration were to be treated in the same manner as murderers, because they had “killed” the manhood of their victim, is a fairly constant theme in Western culture.²⁴⁵ From at least the second century on, Roman law subjected those who castrated others to the same punishment as murderers and poisoners.²⁴⁶ Similarly, in the thirteenth century, Bracton noted that castration was a capital offense.²⁴⁷ Indeed, even in the antebellum American South, it was considered a crime for a white person to castrate a slave, although many other forms of harsh physical abuse were permitted.²⁴⁸ From the perspective of the common law, then, it appears that castration might be considered cruel and unusual because it does more than merely mutilate the offender: it dis-

241. Sir William Blackstone, *Commentaries on the Laws of England* vol. 4, ch. 15, 205–06 (William G. Hammond ed., Bancroft-Whitney Co. 1890). The common law crime of mayhem was also recognized in eighteenth- and nineteenth-century America. See e.g. John Wilder May, *May’s Criminal Law* § 217 (Little, Brown 1893).

242. *Id.*

243. *Id.*

244. *Id.*

245. Of course, the powers that be often did not subject themselves to the same limitations. There are historical examples of emperors and popes employing eunuchs or castrati as guards or singers. Moreover, throughout Western history, castration was sometimes employed as a criminal punishment. See Stelzer, *supra* n. 15, at 1675 n. 6. The Eighth Amendment is a decisive break from that tradition.

246. See *The Digest of Justinian* 48.8.4.2 (Alan Watson ed., U. of Pa. Press 1998) (“The same deified Hadrian wrote in a rescript: ‘It is laid down, in order to end the practice of making eunuchs, that those who are found guilty of this crime are to be liable to the penalty of the *lex Cornelia* [covering murderers and poisoners].’”).

247. Bracton, *De Legibus Et Consuetudinibus Angliæ* vol. 2, 408 (George E. Woodbine ed., Yale U. Press 1922) (“Sed quid dicetur si quis alterius virilia absciderit, et illum cum libidinis causa vel commercii castraverit? Tenetur, sive hoc fecerit volens vel invitatus, et sequitur poena, aliquando capitalis, aliquando perpetuum exilium cum omnium bonorum ademptione.”).

248. See *St. v. Maner*, 20 S.C. 453 (S.C. App. 1834).

ables one of his key bodily functions, thus robbing him of his "courage" or manhood.

The results are similar if one examines castration from the perspective of modern American constitutional law. From the modern perspective, castration robs the offender of at least three fundamental rights that are integral to human dignity: the rights to bodily integrity,²⁴⁹ to procreation,²⁵⁰ and to freedom of thought.²⁵¹ Moreover, castration does more than just infringe these rights; it destroys the offender's very capacity to enjoy them. Just as denationalization deprived the defendant in *Trop* of the "right to have rights," castration deprives the offender of his very capacity to think and perceive sexually, and to procreate. This is more than mere infringement: it is assaultive destruction or maiming. No doubt, the fact that castration involves the assaultive destruction of one's sexual nature is the reason that private individuals were punished like murderers, for castration is, indeed, a kind of partial killing.

To what extent does chemical castration cause injuries similar to those imposed by surgical castration? Like surgical castration, it involves an invasion of bodily integrity. Rather than surgically removing a sex organ, chemical castration requires the injection or ingestion of drugs that override that organ's function. In one sense, this may seem a lesser invasion because it leaves the organ intact. But it is a greater invasion in the sense that it floods the system with a drug that not only impairs organ function, but also imposes severe side effects and health risks (discussed below).

Does chemical castration rob the offender of his "courage" or manhood in the same manner as surgical castration? The answer to this question will depend, in part, on the manner in which the chemical castration laws are implemented. Both chemical and surgical castration deprive the body and brain of testosterone, diminishing or eliminating the offender's ability to think and perceive in a sexual manner, to engage in sexual activity, and to procreate. Therefore, for as long as chemical castration lasts, it destroys the offender's capacity to enjoy the fundamental rights associated with sexuality in precisely the same manner as surgical castration.

The only difference between chemical and surgical castration is that the sexual effects of chemical castration are apparently reversible. But as

249. See *Cruzan v. Dir., Mo., Dept. of Health*, 497 U.S. 261, 278 (1990) (noting that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment," based in large part on the common law principle of bodily integrity, "may be inferred from our prior decisions").

250. See *Skinner*, 316 U.S. at 541.

251. See e.g. *Rennie v. Klein*, 462 F. Supp. 1131, 1144 (D.N.J. 1978) ("The right of privacy is broad enough to include the right to protect one's mental processes from governmental interference."); cf. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (quoting with approval the statement in Justice Brandeis's concurrence in *Whitney v. Cal.*, 274 U.S. 357, 375 (1927), which stated that the Founders "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth").

noted above, the chemical castration laws appear designed to encourage life-long sentences for sex offenders. The majority of the statutes only permit the MPA treatment to cease if the offender can show that it is no longer necessary. But the evidence indicates that when treatment stops, sexual desire returns, and offenders are just as dangerous as they were before they were treated. It is difficult to imagine a scenario in which a sex offender, once sentenced to chemical castration, could ever prove that it was no longer necessary.

The similarities between surgical castration and chemical castration vastly outweigh the differences, particularly given the likelihood that many (if not most) offenders who receive it will be effectively given a permanent disability. If surgical castration is a paradigmatic example of cruel and unusual punishment, then so is chemical castration.

2. Further Characteristics of Chemical Castration

Chemical castration has two additional characteristics that make it inherently degrading, and therefore cruel and unusual, above and beyond its similarities to surgical castration: It exposes the offender to undue health problems and long-term health risks, and involves administration of a mind-altering drug purely for purposes of incapacitation (as opposed to medical treatment). The Supreme Court has held that the government has a duty, under the Eighth Amendment, not to impose conditions of punishment that inherently impose a severe risk of harm to the offender's health and physical well-being.²⁵² Chemical castration subjects sex offenders to severe immediate and long-term physical harm. As noted above, the *intended* effect of chemical castration is to impose a severe impairment to body and brain function, reducing or eliminating the offender's capacity to think, perceive, or perform sexually. Chemical castration also imposes severe side effects on many recipients, including testicular atrophy,²⁵³ dramatic reduction in sperm production,²⁵⁴ pulmonary embolisms, diabetes mellitus, depression, nightmares, weight gain, headaches, muscular cramps, dyspepsia, and gallstones.²⁵⁵

As the symptoms listed above indicate, chemical castration imposes severe, immediate detriments to the offender's health, as well as significant long-term risks. But most significant of all may be its demonstrated impact on bone mineral density. Pfizer, MPA's manufacturer, has warned women

252. See e.g. *Estelle*, 429 U.S. at 104 (deliberate indifference to serious medical needs); *Hutto*, 437 U.S. 678 (personal safety and security); *Helling*, 509 U.S. 25 (exposure to severe risk of future health problems).

253. See Fitzgerald, *supra* n. 15, at 6–7.

254. Saleh & Berlin, *supra* n. 73, at 241 (noting that MPA “decreases spermatogenesis”); Stone, et al., *supra* n. 54, at 96 (chemical castration has the effect of “decreasing morning erections, ejaculation, and spermatogenesis”); Fitzgerald, *supra* n. 15, at 7 (chemical castration results in “a dramatic decrease in sperm count”).

255. *Supra* n. 108 (discussing side effects of MPA).

not to use MPA over the long term (more than two years) because it deprives the body—at least partly irreversibly—of bone mineral density, a loss that could ultimately result in crippling osteoporosis or bone fracture. Even the most lenient sentence involving chemical castration will likely require that it be imposed for more than two years. Many offenders will be required to take MPA for life. Moreover, the dosages given to men are 8 to 43 times greater than the dosages given to women. Therefore, although there are no long-term studies regarding the health effects of MPA treatment on men,²⁵⁶ it appears likely that they will be very severe indeed. The deliberate infliction of such short- and long-term physical suffering on sex offenders is inconsistent with the idea of human dignity that lies at the heart of the Eighth Amendment.

Chemical castration is also inconsistent with human dignity because it imposes pharmacological means to manipulate the thought processes of offenders, and thereby incapacitate them. As the Supreme Court declared in *Trop v. Dulles*, “[f]ines, imprisonment and even execution may be imposed depending on the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.”²⁵⁷ If the coercive imposition of medication is not both medically appropriate and necessary to achieve a compelling government interest, it violates the Fourteenth Amendment’s due process clause. If the medication is imposed solely to incapacitate the offender, it constitutes cruel and unusual punishment.

The chemical castration laws do not even arguably provide for “medically appropriate” treatment. In most states that have chemical castration laws, the imposition of chemical castration is determined primarily by offense of conviction, age of victim, and recidivism. In Oregon, it is determined solely on the basis of the commission of a “sex offense” combined with a determination that the defendant poses a relatively high risk of recidivism. In Wisconsin, the statute prescribes no substantive standards other than offense of conviction. All states provide for either minimal or no medical review, usually given years or decades before the treatment actually starts.

Not one state statute requires a determination that the offender suffer from a sexual disorder. Indeed, as Florida and Oregon’s attempts to implement their castration laws indicate,²⁵⁸ those responsible for imposing chemical castration on sex offenders appear to be focusing solely on either offense of conviction, or risk of re-offense, or both. Because there is absolutely no effort to restrict the use of chemical castration to those who have a sexual disorder, it cannot be justified as a form of medical treatment.

256. See e.g. Saleh & Berlin, *supra* n. 73, at 240; Fitzgerald, *supra* n. 15, at 9.

257. 356 U.S. at 100.

258. See *supra* sec. II.C.1.

Because the chemical castration laws do not even attempt to administer MPA on the basis of medical need, their only purpose must be incapacitation. But it violates the Eighth Amendment to use pharmacological means to incapacitate defendants. Using medical technology in this manner has the potential of transforming criminal punishment into mere biological manipulation. This practice is particularly troubling where, as here, the drug being coercively administered operates directly on the brain. Governmental manipulation of thought processes is inconsistent with the notion of human dignity that lies at the base, not only of the Eighth Amendment, but of the very idea of a free society.

Ironically, the only state that appears to stay within the bounds of the Eighth Amendment is Texas, which offers the option of surgical rather than chemical castration. In Texas, castration may be performed only at the instigation of the defendant. The courts and the prison system are forbidden from either requiring castration as a condition of release, or offering benefits such as early release in exchange for undergoing the operation. Moreover, several rounds of screening are involved, to ensure the offender has not been subjected to coercion, and understands the medical, legal, and ethical implications of the procedure. If the "chemical castration" states adopted the procedures employed by Texas for surgical castration, there would be no question as to whether they violated the Eighth Amendment.²⁵⁹

CONCLUSION

The chemical castration laws deny human dignity, and thus violate the Eighth Amendment, because they treat sex offenders as things rather than persons, as means to an end rather than ends in themselves. Chemical castration disables the offender in body and mind, and exposes him to severe short- and long-term health consequences. Moreover, the avowed purpose of chemical castration is not to make sex offenders more whole, but to maim them, and thus incapacitate them. These laws require the imposition of chemical castration in the absence of any evidence that the offender who undergoes this procedure even has a sexual disorder, much less a sexual disorder for which MPA treatment may provide therapeutic value. The Eighth Amendment does not permit us to maim dangerous offenders in order to render them harmless. Because chemical castration shackles and cripples the body of sex offenders, it should be struck down as a cruel and unusual punishment.

259. This is not to say that Texas's voluntary surgical castration regime necessarily comports with human dignity. But because the state neither requires offenders to undergo this procedure nor rewards them for doing so, the procedure cannot be classified as "punishment" within the meaning of the Eighth Amendment.